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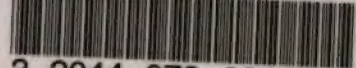
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REPORTS OF CASES

DETERMINED IN THE

SUPREME COURT

OF THE

STATE OF WASHINGTON,

CONTAINING
DECISIONS RENDERED FROM JUNE 18 TO NOVEMBER 30, 1896,
INCLUSIVE.

EUGENE G. KREIDER,
REPORTER.

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STATE OF WASHINGTON.**

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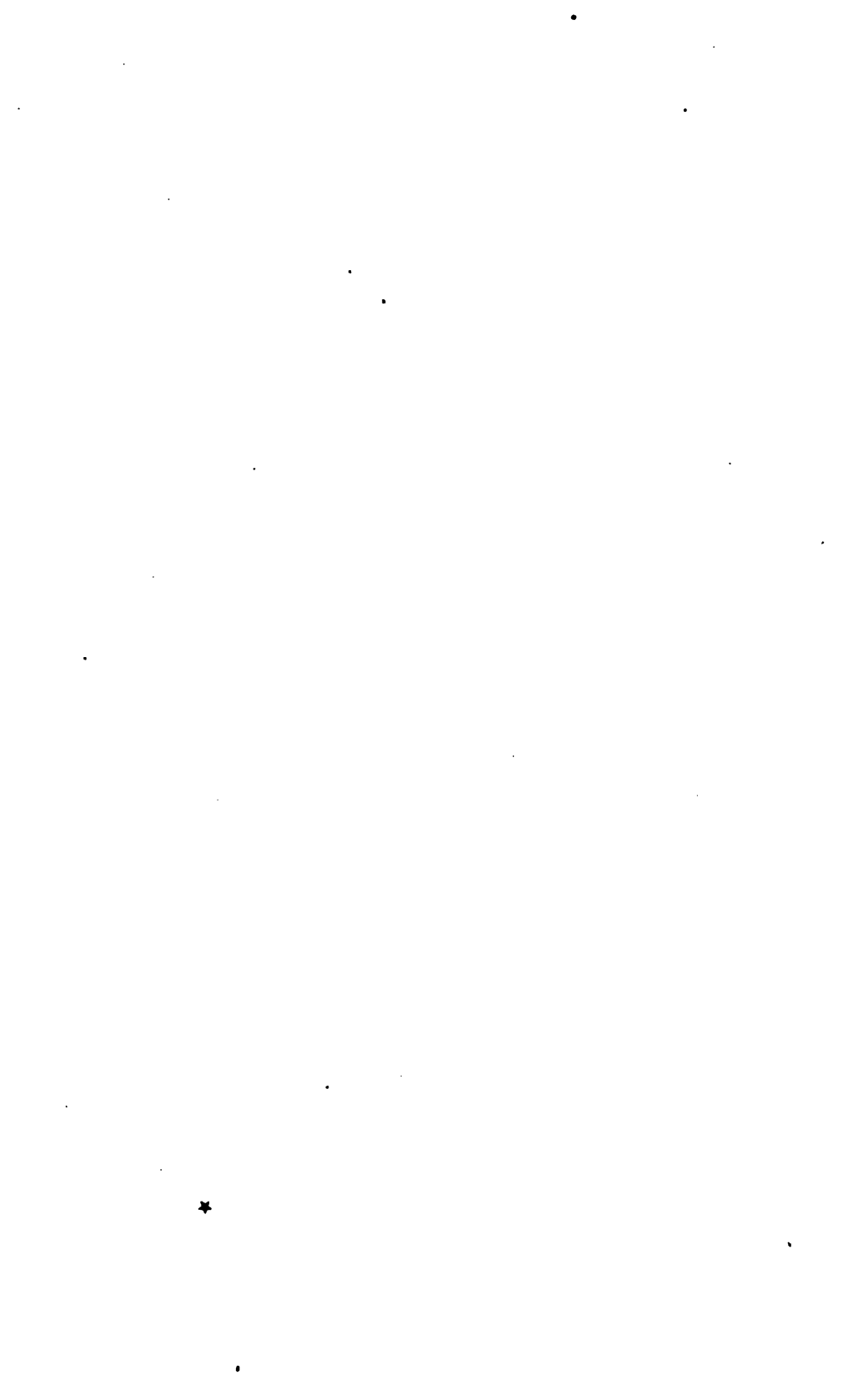


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REPORTS OF CASES

DECIDED IN

THE SUPREME COURT

OF THE

STATE OF WASHINGTON.

[No. 2115. Decided June 18, 1896.]

THE STATE OF WASHINGTON, *Respondent*, v. M. H.
NICHOLS, *Appellant*.

CRIMINAL LIBEL — INSTRUCTIONS — SUFFICIENCY OF INDICTMENT.

In a prosecution for criminal libel it is not error for the court to charge the jury that "the publisher of a libel is presumed to intend what the publication is likely to produce," although §17 of the Penal Code, defining libel, may omit any reference to the matter of malice or intention constituting an element of the crime.

The fact that oral instructions were given to the jury in the absence of defendant cannot be urged on appeal when it does not appear from the record what the instructions were, nor from any source that they were prejudicial, nor that the matter was called to the attention of the court upon a motion for a new trial.

An indictment for criminal libel, which sets forth the libelous article and charges defendant with "thereby *intending* to provoke [the person libeled] to wrath, and expose him to public hatred, contempt and ridicule and deprive him of the benefits of public confidence and social intercourse," is sufficient, although the statute defines libel as "the defamation of a person . . . *tending* to provoke him to wrath, or expose him to public hatred," etc.

Appeal from Superior Court, King County.—Hon.
T. J. HUMES, Judge. Affirmed.

Winsor, Bush & Morris, and *John Wiley*, for appellant.

15	1
38	513

A. W. Hastie, Prosecuting Attorney, *W. W. Wilshire*, and *J. T. Ronald*, for The State.

The opinion of the court was delivered by

DUNBAR, J.—The appellant was convicted of the crime of libel, and from the judgment of conviction appeal is taken to this court. The indictment, omitting the formal part and commencing with the recital of the libelous matter charged as being published, is as follows :

“SEATTLE, WASH., April 20, 1894.

“I first became acquainted with Rev. T. B. Ford in 1872 at the St. Louis Conference of the M. E. Ch., where I was appointed to Pine Bluff, Ark., a new charge organized by Ford. The male members were mostly ‘pothouse politicians’ of the lowest type most of whom did not pretend to be moral, much less christian. By misrepresentation of the character of his work to Bp. Scott, Ford got himself appointed P. E. of a district.

“In the spring of 1873, Ark. was organized into a separate conference with three districts, and J. H. Gillan, R. W. Hammett and T. B. Ford as presiding elders. Before going to confce., I learned that Hammett had embezzled some of the young preacher’s missionary money. At the confce. I learned that one D. W. Calfee, whose money had been withheld, intended to arrest Hammett’s character. When the Fort Smith Dist. was called, I inquired of a young preacher by the name of Smith as to the reason of the absence of Calfee. He replied, ‘Calfee is afraid to come into the Ch. He is on the street. Gillam and Ford have ordered him to stay out until after Hammett’s character passes, and have threatened his expulsion from the ministry and the Ch. in case of refusal.’ ‘Well,’ said I, ‘we will see whether these fellows can play that kind of a game in this confce.’ So I arrested the passage of Hammett’s character. This was at the organization of the confce.; so these gentlemen asked me whether I intended to join

June, 1896.] Opinion of the Court—DUNBAR, J.

the new confce., and, on being answered in the negative, objected to my authority to make the arrest, and were sustained by the authority of Bp. Bowman. I never knew why Ford was so much interested in the matter, until I came to California, where while attending the California Confce., Calfee informed me that this embezzled money went to T. B. Ford, and was used or claimed to be used, by him to pay the way of another Ford while attending the Ark. Ag. & Mech. College, under pretense of his preparing for the ministry in the M. E. Ch., when he did not belong to it. If anyone interested doubts this statement, let him examine last year's missionary appropriations to paper appointments on Seattle Dist., and interview the supplies to learn how much missionary money they have received.

"In 1884, I transferred back to Ark. Confce. Bp. Bowman had told me in India while en route from Bombay to Madras, that he had reduced Hammett and Gillam to the ranks on this wise. There was a preacher by the name of Farmer, a graduate of Boston Univ. & Theol. Semnry. down there against whom Ford, Gillam and Hammett had trumped up charges. They got their rather pliant confce. brethren who were a 'ringed, straked and speckled' lot of fellows, to vote for a resolution admitting letters as testimony. The Bp. said he allowed them to proceed without interposing any objection. Before they could proceed to the case of Farmer the Bp. said: 'Now, brethren, I have sufficient testimony of this kind to put the P. E's. of this confce. out of the ministry, and of the Ch.' At the same time unloading both breast pockets of his coat and laying them on the table before him. 'Now,' said he, 'go on with the case of Bro. Farmer, and we will attend to your case afterwards.' They grounded arms and run up the white flag. Thereupon the Bp. deposed Hammett and Gillam from the presiding eldership. Hammett was not a villain at heart, but lacked the force of character to stand up against the villainy of others. Gillam was an opium eater, and occasionally would get drunk, as

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Bro. Bushong of Oregon Conference could testify, and had, I think, at one time been a good man. But I never heard Ford accused of being anything but a scoundrel or something worse.

"Ford deserves a patent on a new method of making oneself a D. D. In 1884, Rev. G. W. Gray (now at the head of the Epworth League), was Prest. of the Little Rock university of the M. E. Ch. A conspiracy was brewing to drive Gray out of his position. It afterwards succeeded, and one Prof. Lewis, a nephew of Bp. Wiley, then a professor, was appointed by and with the consent of Dr. Rusk. The means used by Ford and his accomplices was a lie to this effect; 'That Dr. Gray had said in a lecture in Little Rock that he had traveled all over Arkansas, and taken pains to inform himself on the subject, and that there was not more than a wheelbarrow load of books in all the public libraries of the state.' What he did say was that there were not more books in all the common school libraries than would fill a wheelbarrow. Dr. Gray resigned, Lewis was appointed, and afterward being transferred to Chattanooga University, remembered his benefactor, who was thereafter to be known as a D. D. The method is certainly original, and Ford deserves a patent.

"After transferring from the St. Louis to the Southern Illinois Conference, and while stationed at Anna, Ill., I was told by an old man, a member of the M. E. Ch. that Ford, when a young man, and while in the ministry, seduced a young woman, hired or persuaded another man to marry her, and after the other man left her, married her himself, after a short interview in a smoke house. This account was confirmed by D. W. Calfee, with additional particulars. And while in Little Rock in 1884, I was told by leading men of the city, formerly members of the M. E. Ch., that Ford had an illegitimate heir in Arginta, opposite Little Rock, and across the river from it.

"These facts I give just as they were given to me, or as they are personally known to myself. I think that

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the interest of public morals, and the cause of Christ, demand that they be made public.

“(Signed) M. H. NICHOLS,

“Care GEO. W. KNOWLES,
“Room 9, Llewellyn Dodge Bldg., Seattle.”

“Thereby intending to provoke the said Rev. T. B. Ford to wrath and expose him to public hatred, contempt and ridicule, and deprive him of the benefits of public confidence and social intercourse, and he, the said M. H. Nichols, at the time of the making, writing and publishing of the said libel as aforesaid, knew that the said libel was false and untrue, and in truth and in fact, the said scandalous and libelous statements contained in said writing are and were untrue at the date and time of such writing and publication as aforesaid.

“Dated at Seattle in the county and state aforesaid this 22d day of September, 1894.

“JOHN F. MILLER, Prosecuting Attorney,

“By A. G. McBRIDE, Deputy.”

The first error alleged is the refusal of the court to strike out the testimony in regard to the sickness of Mrs. Ivey. Considerable was said in relation to this in the oral discussion of this case, but an investigation of the record shows that the court did substantially strike out the testimony objected to and especially admonished the jury that the matter under discussion by the attorneys at that time had nothing to do with the questions at issue; that it should be disregarded by them absolutely.

The seventh instruction, which is alleged as error, was as follows:

“The intent with which a publication is made, rather than its truth or falsity, is the correct criterion by which a jury is to determine whether such a publication is a libel. The intention is a matter of inference from the nature of and the facts surrounding the publication. The law presumes that every one intends the necessary and probable consequences of his acts.

The publisher of a libel is presumed to intend what the publication is likely to produce. It is therefore as much a question of whether the tendency was injurious to the person of whom published, as to whether the defendant intended to injure the person libeled."

Sec. 17 of the Penal Code defines "libel" to be "the defamation of a person made public by any words, printing, writing, sign, picture, representation, or effigy tending to provoke him to wrath, or expose him to public hatred, contempt or ridicule, or to deprive him of the benefits of public confidence and social intercourse." It is doubtful, under this definition of the crime, whether the question of malice or of intention enters in, but in any event the concluding language of the court in the instruction objected to is but a logical result of the announcement made before, that "the intention is a matter of inference from the nature of and the facts surrounding the publication," and that "the law presumes that every one intends the necessary and probable consequences of his acts;" which is without question the law as a general proposition.

We think the court correctly instructed the jury in relation to privileged communications, and, considering the instructions as a whole, that the law was correctly announced to the jury on all the propositions.

The other assignment is that the court below erred in giving an oral instruction to the jury in the absence of the prisoner and his counsel, and without notice to them. It does not appear from the record what this instruction was, neither does it appear from affidavit or any other source that the instruction was prejudicial to the rights of the defendant, and in the absence of such a showing the judgment would not be reversed. But, in addition to this, it does not appear

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that this question was called to the attention of the court on a motion for a new trial, and for that reason, if for no other, it will not be discussed here. In fact, the record in this case is silent as to what the motion for a new trial was based upon. The record shows that upon the return of the jury the defendant in open court gave notice of intention to move for a new trial, which was on the 2d day of February, 1895. The next and only reference to the question of new trial is the following: "This cause being heard on the motion of defendant for a new trial, the court on consideration, both parties being present by counsel and defendant in person, denies said motion. Exceptions taken;" (signed by the judge). This was on March 16 1895.

The only question that has raised any doubt in the mind of the court is the one embraced in the motion in arrest of judgment, viz., that the facts stated in the information do not constitute a crime or misdemeanor or any other offense against the laws of the State of Washington, in that it is not charged that the matter published tended to provoke to wrath, expose to public hatred, contempt or ridicule, or to deprive of the benefits of public confidence and social intercourse the person of whom it is alleged to have been published. It will be noticed that the indictment does not contain the averment that the publication of this matter tended to provoke the said Rev. T. B. Ford to wrath, etc., but the language is "thereby intending to provoke," etc. We have examined the cases cited on this proposition by both appellant and respondent, and they all seem to be innocent of any information on the subject under discussion here. We think, however, that, under the provision of our statute (Code Proc., § 1234) that "the indictment must con-

tain a statement of the acts constituting the offense in ordinary and concise language without repetition, and in such a manner as to enable a person of common understanding to know what is intended," this indictment is sufficient. The statement that it tended to provoke him to wrath, etc., would have been really the pleading of a conclusion instead of a fact. In any event it is not a necessary allegation when the libelous article itself is set forth in the indictment. This is not a case where the words in themselves do not import a slanderous meaning, and where an averment by way of innuendo is necessary, but a reference to the indictment will show that the words published were libelous on their face; that they were slanderous in themselves, and no other conclusion could be reached, either of law or of fact, than that their publication tended, if not to provoke the subject of the remarks to wrath, at least to expose him to public hatred, contempt or ridicule, or to deprive him of the benefits of public confidence and social intercourse. In view of the language used in this publication, we think it would neither subserve justice, nor be in accord with modern authority, to hold the indictment insufficient on account of the omission of the phrase "tending to expose," etc.

Finding no error in the record the judgment will be affirmed.

HOYT, C. J., and SCOTT and ANDERS, JJ., concur.

GORDON, J., concurs in the result.

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Syllabus.

[No 2137. Decided June 18, 1896.]

THOMAS LANCEY *et al.*, Appellants, v. KING COUNTY
et al., Respondents.

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CONSTITUTIONAL LAW—TITLE OF ACT—PUBLIC IMPROVEMENTS—
COUNTY AID—EMINENT DOMAIN—EXERCISE FOR BENEFIT OF
UNITED STATES.

An act of the legislature will not be declared void on the ground of violating the constitutional provision that "no bill shall embrace more than one subject, and that shall be expressed in the title," unless the violation is most clear—sound policy and legislative convenience requiring that this provision should be liberally construed.

The act of February 12, 1895, entitled "an act to grant and prescribe powers of counties relative to public works undertaken or proposed by the State of Washington, or the United States," contains but one subject matter, which is fairly embraced within the scope of its title.

An act authorizing counties to condemn land for a right-of-way for a ship canal projected by the general government, is not a violation of art. 8, § 7, of the constitution, which forbids counties giving any money or property, etc., to or in aid of any individual, association, company or corporation, etc., as neither the state nor the United States can be brought within the meaning of the section.

Such undertaking is not open to the objection that it is in violation of art. 8, § 6, of the constitution, which prohibits a county from incurring debt for any other than strictly county purposes, as it is entirely within the limits of the county, and for the purpose of connecting two large local waterways with the Pacific ocean.

The fact that an act authorizes the exercise of the state's eminent domain for the purpose of constructing a ship canal which shall be under the control of the general government, but for the use and benefit of the public generally, will not render the act unconstitutional, when there is no express constitutional provision prohibiting it.

Appeal from Superior Court, King County.—Hon.
J. W. LANGLEY, Judge. Affirmed.

C. W. Turner, for appellant.

A. W. Hastie, Prosecuting Attorney, (Roger S.

Greene, and Thomas Burke, of counsel), for respondents.

The opinion of the court was delivered by

SCOTT, J.—This action was brought to enjoin the respondents, as county officers, from proceeding, under an act of the legislature approved February 12, 1895 (Laws 1895, p. 3), entitled "An act to grant to and prescribe powers of counties relative to public works undertaken or proposed by the State of Washington, or the United States, and declaring an emergency," to condemn land for a right of way for a ship canal to connect Lakes Union and Washington in King county with the waters of Puget Sound, an undertaking projected by the general government.

The constitutionality of the act is attacked upon several grounds, the first of which is that it is in violation of § 19, art. 2, of the constitution, which provides that "No bill shall embrace more than one subject, and that shall be expressed in the title." Similar provisions are contained in the constitutions of many of the states, and there are so many cases bearing upon the proposition as to prevent a consideration of them in detail. It is well settled, however, by the weight of authority, that an act of the legislature will not be declared void except in cases where the violation of this constitutional inhibition is most clear, and sound policy and legislative convenience require that this provision should be liberally construed. The subject of this act is the condemnation and disposal of land by counties for a public use in relation to public improvements undertaken by the State or the United States; and, in our opinion, the subject matter of the act is fairly included within the scope of its title, and there is nothing misleading in

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Opinion of the Court—SCOTT, J.

the title. The powers granted are not itemized therein, but this is unnecessary. The title gives notice that certain powers are granted for the purposes mentioned, and that those powers are prescribed in the act. There is one general subject embraced in the act and only one, and that is expressed in the title sufficiently to prevent any person from being misled thereby. The purpose of the title is only to call attention to the subject matter of the act, and the act itself must be looked to for a full description of the powers conferred. *Marston v. Humes*, 3 Wash. 267 (28 Pac. 520); *Montclair v. Ramsdell*, 107 U. S. 147 (2 Sup. Ct. 391); *State, ex rel. McCarty, v. Comrs.*, 26 Ind. 522; *People v. Briggs*, 50 N. Y. 553; *Alleghany Co. Home's Case*, 77 Pa. St. 77; *Johnson v. People*, 83 Ill. 431.

Another objection is that the act is in conflict with §7, art. 8, of the constitution, which provides that, "No county . . . shall hereafter give any money or property, or loan its money or credit, to or in aid of any individual, association, company or corporation, except for the necessary support of the poor and infirm, or become directly or indirectly the owner of any stock in or bonds of any association, company or corporation." It is clear that neither the state nor the United States is an "individual, association, company or corporation," within the meaning of this section, and cannot legitimately be brought therein by any judicial construction thereof. *Walker v. Cincinnati*, 21 Ohio St. 14 (8 Am. Rep. 24).

It is next insisted that the act is obnoxious to the provisions of §6, art. 8, of the constitution, which prohibits a county from incurring debt for any other than strictly county purposes, it being contended that the tax to be levied in the prosecution of said under-

taking is not for a county purpose, but that it is for a state or federal purpose. But it is beyond question that the proposed undertaking is a public improvement. It is entirely within the limits of King county, and is for the purpose of connecting two large public waterways with the Pacific ocean, and it seems to us that such a canal can more properly be considered a public improvement than a railway for the construction of which it is well settled that aid may be granted by a municipality when authorized to do so by the legislature, there being no constitutional prohibition. The word "strictly" lends little or no additional meaning to the provision. It could not have been intended thereby to limit counties to ordinary running expenses, and a canal may be as strictly a county purpose as a highway or a bridge, etc. It is apparent that the benefits resulting from this particular improvement will be largely local, notwithstanding the fact that it may also be of great general benefit, and it results that the purpose of the tax is local as well as public. 1 Desty, Taxation, §§ 8, 59; *Goddin v. Crump*, 8 Leigh, 120; *County of Mobile v. Kimball*, 102 U. S. 691; *Folsom v. Ninety-Six*, 159 U. S. 611 (16 Sup. Ct. 174); *Atlantic Trust Co. v. Darlington*, 63 Fed. 76; *Hasbrouck v. Milwaukee*, 13 Wis. 42 (80 Am. Dec. 718); *Burr v. Carbondale*, 76 Ill. 455.

The remaining objection to the act and the one most strongly insisted upon by the appellants is that the act authorizes the exercise of the state's eminent domain for the use and benefit of the United States. But this is hardly a fair statement of the proposition. While it is proposed to convey the right of way, when obtained, to the United States, the improvement is for the use and benefit of the general public and in a much greater degree for the citizens of that locality.

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It is not to be occupied and controlled by government agents like a fort, but is for everybody's use as a great public highway, and the control by the general government is only to regulate that use for the general good, and it matters little by whom this is done. The essential character of the work, as a local public improvement directly connected with the commercial business of the citizens of the county, cannot be taken away from it, even though it has a considerable value to the general government for naval purposes and otherwise. It is apparent that the character of the work cannot be essentially altered by its ownership or control, and it is immaterial whether the United States or the county prosecutes the enterprise, or whether they do so jointly. Nor can it make any difference whether the power of the state or that of the general government is invoked to condemn the right of way. It is conceded that either the United States or the county could singly prosecute the enterprise, and if either could do it, it would require some good reason for holding that they could not proceed jointly. The appellants contend that, in all cases where the eminent domain of the state is exercised in the prosecution of a public improvement, the improvement when constructed must remain in the control of the local authorities. If this assertion were true, it would afford a sufficient reason for holding that the contemplated undertaking was unauthorized in the form in which it is being prosecuted. But we are clearly of the opinion that this contention is not well founded, as, if the improvement be for a public use and benefit, the state can authorize the exercise of its eminent domain by individuals or by corporations other than municipal, and if there is no constitutional prohibition, it may be a foreign corporation. N. Y.

& *Erie Ry. Co. v. Young*, 33 Pa. St. 175; *Abbott v. N. Y. & N. E. R. R. Co.*, 145 Mass. 450 (15 N. E. 91). And in such cases the control or management of the improvement is not retained by the state. For a more marked instance see the case of *In re Townsend*, 39 N. Y. 171, where a canal was constructed without the limits of the state, but which resulted in some damage to lands within the state.

Appellants concede that there are several cases holding that the exercise of the state's eminent domain can be for the benefit of the United States, but they contend that in such instances the question of the public use was a legislative and not a judicial question; but it is apparent that this can go only to the manner of deciding it, and if it is for a public use, the condition is satisfied, however decided.

A case very like the one at bar was that in the *Matter of Petition of United States*, 96 N. Y. 227, where many of the cases are taken up and considered. There, by an act of the legislature, the United States was granted the right to acquire the right of way necessary for the improvement of the Harlem river and Spuyten Duyvil creek, and for the construction of another channel from the North river to the East river through the Harlem Kills, and ceding jurisdiction. The undertaking was prosecuted jointly by the state and national governments, and the court said that if either party might proceed in the matter, "it would be very singular if that which either party might do could not with equal propriety be accomplished by both." If such were not the case, it might prevent the consummation of a great public undertaking, such as is contemplated here, on account of the vast expense, if it was to be exclusively borne by the locality principally benefited, and through the

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unwillingness of the general government to bear the entire expense where the benefits were so largely local.

We are of the opinion that no such condition of affairs was intended by the constitution makers, and there being no express provisions in the constitution prohibiting it, a narrow, technical construction should not be adopted to bring it about.

Affirmed.

HOYT, C. J., and DUNBAR, ANDERS and GORDON, JJ.,
concur.

[No. 2195. Decided June 19, 1896.]

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THE STATE OF WASHINGTON, *Respondent*, v. EDWIN
BALDWIN *et al.*, *Appellants*.

HOMICIDE — SUFFICIENCY OF INFORMATION — PLACE OF DEATH — DYING
DECLARATIONS — COMPETENCY — PAROL EVIDENCE OF MEMORANDA —
INSTRUCTIONS.

Under Laws 1891, p. 47, § 4, providing for the trial of all criminal actions in the county where the offence was committed, it is not necessary, in an information charging the commission of murder in a certain county, to also allege the place of death of the deceased, in order to give jurisdiction to the court of the county where the offence was committed.

Where an information charges the commission of murder in a certain county, but fails to allege where the deceased died as a result of the assault upon him, the introduction of proof showing death in the county in which the assault was made is harmless error.

The constitutional provision declaring that the accused shall have the right to meet the witnesses against him face to face, will not exclude evidence of dying declarations.

Proof of conviction of an infamous crime may be given to affect the credibility of one making dying declarations, but cannot be urged as a ground for their exclusion.

The fact that, for some days after deceased had been shot, he had no fear of impending death, is not ground for excluding his dying declarations, when it appears that at the time they were made, his condition had grown more serious, and he had been told by the doctor he was about to die, and had said that he realized it.

Where a dying declaration has been made to an attorney, who afterwards, not in the presence of the deceased, reduced it to writing, but not always in the language of the deceased, even including incorrect statements in one or two minor matters, and the declaration is subsequently read to the deceased and signed by him, it is still admissible in evidence, as a question for the jury to pass upon.

The fact that notice had been served upon the state to produce a certain memorandum book at the trial of a criminal prosecution, which the state was unable to produce for the reason that it had been removed from the jurisdiction of the court, will not preclude the state from contradicting oral testimony on the part of the defendant as to the contents of an entry in dispute.

It is not error upon the part of the court to refuse to give instructions in the language requested, although the same may correctly state the law, if the court fairly gives substantially the same instructions in other language.

Appeal from Superior Court, Skagit County.—Hon. HENRY MCBRIDE, Judge. Affirmed.

Lindsay, King & Turner, and *Sinclair & Smith*, for appellants.

George A. Joiner, Prosecuting Attorney, and *J. T. Ronald*, for The State.

The opinion of the court was delivered by

SCOTT, J.—The defendants were convicted of manslaughter and have appealed. The body of the information under which they were tried is as follows:

“Edwin Baldwin, Ozro Perkins and Ulysses Loop are accused by George A. Joiner as Prosecuting Attorney of Skagit County, State of Washington, by this information of the crime of murder in the first degree committed as follows:

The said Edwin Baldwin, Ozro Perkins and Ulysses Loop in the County of Skagit, State of Washington,

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on the 9th day of August, A. D., 1895, then and there being did purposely and of their deliberate and premeditated malice kill one Alonzo Wheeler by then and there purposely and of their deliberate and premeditated malice striking and beating him the said Alonzo Wheeler with a heavy stick, towit: a cane, kicking and stamping him with the heels of their boots and shoes and shooting him with a certain gun, towit: a revolver, loaded with powder and ball, thereby mortally wounding the said Alonzo Wheeler of which mortal wounds he the said Alonzo Wheeler, on the 15th day of August, A. D., 1895, died."

The defendants demurred thereto on the ground that the facts charged do not constitute a crime, and the overruling of the demurrer is insisted upon as error, for the reasons that while the information charges that the blow was given in Skagit County on the 9th day of August, 1895, it also alleges that the deceased did not die until the 15th day of August, and the place of death is not alleged. This contention is urged on two grounds, one of which is that the court had no jurisdiction to try the offence. The other is that it violated the constitutional right of the defendants to be informed of the nature and cause of the accusation against them. In support of the first ground appellants cite *Ball v. United States*, 140 U. S. 118 (11 Supt. Ct. 761). But that case was decided under the common law rule, and it is not applicable here under our statutes. Sec. 4, p. 47, Laws 1891, provides for the trial of all criminal actions in the county where the offence was committed, and this offence was committed in Skagit County, regardless of the time or place of death of the deceased.

The next objection does not seem to have been presented to the court on the argument of the demurrer, but was raised by an objection at the trial to proof of

the place of death offered by the state. It was not an error going to the jurisdiction of the court, and from the proofs it is apparent that no harm resulted to the defendants.

The next question is that the defendants could not be tried by information, but must be prosecuted under an indictment by a grand jury. As this point had been previously decided by this court contrary to the contentions of appellant, in a case pending on an appeal to the supreme court of the United States (*State v. Nordstrom*, 7 Wash, 506, 35 Pac. 382), it was not urged upon the oral argument, the desire of appellants being to save the question, and the court will at this time follow its former ruling.

The point mainly relied upon by the appellants is that the court erred in admitting in evidence the dying declaration of the deceased, appellants contending that such evidence is inadmissible in any case under the constitution and laws of this state, and as relating to this particular declaration it is contended that it was inadmissible because the deceased had been convicted of an infamous crime, and had not been pardoned, that it did not appear sufficiently by the evidence that at the time of making the declaration the declarant was impressed with the belief of impending death, and because it appears from the record that such dying declaration is not in the language of the declarant, and there being some proof to show that a portion of it is contrary to his statements. As to the first proposition the provision of the constitution is cited declaring that the accused shall have the right to meet the witnesses against him face to face, etc. (§ 22, art. 1); and also § 1309, Code Proc., providing that "the rules of evidence in civil actions, so far as practicable, shall be applied to criminal prosecu-

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tions." It is conceded by appellants that such declarations have been commonly admitted in evidence under a constitutional provision similar to ours, and it has been the practice in this state up to the present time. We regard it as so well settled that the question is no longer an open one. There was some testimony to show that the deceased had been convicted of a felony, and appellants contend that for this reason the dying declaration should not have been received, as it would have been inadmissible under the common law rule. But this is because such person would not have been a competent witness if alive. In this state the statute has changed the rule, § 1647, Code Proc., and the deceased would have been a competent witness, had he been living, the conviction having been for stealing cattle. The conviction could be shown for the purpose of affecting his credibility. As the statute has changed the rule admitting such testimony by a living witness, the same results should follow as to a dying declaration, for the same proof of conviction can be made to affect the credibility of the declaration, and it was done in this instance.

There was also testimony to show that for some days after the deceased was shot he had little or no fear of impending death, but this was prior to the time his declaration was made, and the proof showed that at the time such declaration was made, he had experienced a change and had grown much more serious. He had been informed by the doctor that he was about to die, and said that he realized it. This was sufficient to make the declaration admissible. It also appeared that the deceased had sent for an attorney and had related to him the circumstances of the shooting, and that some time thereafter, said attorney reduced the

same to writing, not in the presence of the deceased, and not always in the language of the deceased, and it also appears that in one or two matters said attorney testified the statement was incorrect, and that he had made a mistake therein in reducing it to writing, but it appears that the statement had been read to the deceased a short time before his death, and that, after directing a portion of it to be re-read to him, he seemed satisfied with it and signed it. The fact that it was not in the exact language of the declarant would not render it inadmissible. Nor would the testimony of the attorney who reduced it to writing that it was incorrect in one or two particulars, as it would still be a question of fact for the jury. The alleged mistake related to an unimportant matter leading up to the time of the controversy, and it probably escaped the attention of the declarant at the time the same was read over to him. None of the objections raised against the admission of the dying declaration are tenable.

It is next contended that the court erred in allowing witnesses for the state to contradict certain testimony given by witnesses for the defendants as to the contents of a certain memorandum book, going to show that a certain entry therein was made prior to the time of the shooting. A notice had been served upon the state to produce the book at the trial, but being unable to comply therewith, the defendants were permitted to give oral proof of its contents. It appeared by the defendants' testimony that the book had been taken beyond the jurisdiction of the court prior to the time of the trial. It does not appear that there was any bad faith upon the part of the prosecution in failing to produce the book, or that it was possible for the prosecution to have produced it. We

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know of no rule of law that would prohibit the state from contradicting the testimony as to the contents of the book given by the witnesses for the defense.

The instructions given by the court upon the subject of the dying declaration and the question of self-defense were voluminous, and they are attacked by the appellants in a great many particulars. It is contended that the court did not give some of the instructions requested, even in substance, which correctly stated the law. But we do not think this contention is sustained by the record and the only ground for complaint is that the court failed to give some of the instructions in the language requested. We have often held that it was not error upon the part of the court to refuse to give instructions in the language requested, although the same might correctly state the law, if the court should fairly give substantially the same instructions in other language, and we think in this instance that every instruction requested by the defendants which they were entitled to have given, was in substance fairly given by the court to the jury, and being of the opinion that no new points are presented for our consideration in the questions raised over the instructions in this case, we do not deem it advisable to set them forth at length. After an examination thereof we are satisfied that the court fairly and impartially submitted the case to the jury, and that the defendants have no just ground of complaint as to any of the instructions given or refused.

Affirmed.

HOYT, C. J., and DUNBAR, ANDERS and GORDON, JJ.,
concur.

[No. 2185. Decided June 20, 1896.]

T. W. SOULES, *Respondent*, v. GEORGE D. McLEAN,
Appellant.

APPEAL—JUDGMENT BELOW UPON REMAND.

Where the appellate court has held that the appellant holds certain real estate in his own name in trust for a partnership of which he was a member, and that upon payment to him of moneys advanced for its purchase, for which he was entitled to a lien thereon, the remaining property or its proceeds should be divided among the partners according to their proportionate interests, the trial court on a remand of the case has no authority to enter an order that the respondent would be entitled to a deed conveying to him a certain proportion of the trust property on his payment to appellant of respondent's proportion of the indebtedness.

Appeal from Superior Court, Skagit County.—Hon.
HENRY MCBRIDE, Judge. Reversed.

Millon & Houser, for appellant.

Sinclair & Smith, and *A. M. Moore*, for respondent.

The opinion of the court was delivered by

Hoyt, C. J.—Upon a former appeal in this action (7 Wash. 451, 35 Pac. 364) it was held that certain property standing in the name of the defendant and appellant was held by him in trust for a partnership of which he, the plaintiff and one McKay were the individual members; that he had a lien thereon for any balance which might be found to be due him on account of moneys which he had advanced for the benefit of the partnership; that he should first be repaid the amounts so advanced, and thereafter the property remaining, or its proceeds, should be divided, one-half to himself and a quarter to each of the other partners. And the case was remanded with

June, 1896.] Opinion of the Court—Hoyt, C. J.

instructions that an accounting be had for the purpose of determining the amount of such advances, and for the payment thereof out of the trust property, and for the division of the remainder, or the sale of it, and the division of the proceeds. Thereafter such accounting was had, from which it was made to appear that there was something over \$16,000 due appellant. Thereupon the court made an order that upon the payment to or for the use of the appellant of one-fourth of the amount so found to be due, respondent would be entitled to a deed conveying to him one-fourth of the trust property.

From this order and the decree entered in pursuance thereof defendant has again appealed, and we feel compelled to hold that the order and decree were not in accordance with the directions of this court. What this court found was that appellant had a lien upon the entire property for the entire amount of his advances, and not that he had a lien upon respondent's one-fourth interest for one-fourth of the amount of the advances. It was found that the advances were made for the benefit of the partnership and that appellant was entitled to be reimbursed for such advances before any of the property could be released from the lien created by the agreement of the parties. Hence, when the court ordered that one-fourth of the property should be released from the lien upon the payment of one-fourth of the advances, it was not proceeding in accordance with the opinion rendered upon the former appeal. As well might it be claimed that a mortgagor having given a mortgage for a specific sum upon an entire tract would be entitled to have the lien of the mortgage discharged as to one-fourth of such tract by the payment of one-fourth of the amount of the mortgage. The lien of such a

mortgage is an entirety upon the entire property covered by it, and no part of such property can be discharged from the lien until the entire amount has been paid. Likewise was the lien for these advances an entirety and the whole property bound therefor, and the only way in which any part of it could be released from such lien would be by the payment to the appellant of the entire amount of the advances. The only way that the court can close up the affairs of the partnership is by a sale of the property. The proceeds of such sale must be first applied to the payment of the amount found due appellant. If anything is left after such payment it must be divided among the partners in accordance with their respective interests. The evidence is not such that we feel compelled to reverse any of the findings of the trial court as to the amount due appellant, or to justify us in interfering with its discretion in the appointment of a receiver.

The decree will be reversed and the cause remanded for further proceedings in accordance with the directions of the opinion rendered upon the first appeal and contained herein.

ANDERS, GORDON and DUNBAR, JJ., concur.

[No 2238. Decided June 20, 1896.]

THE STATE OF WASHINGTON, *on the Relation of W. H. Heaton, Appellant, v. NATHAN BEMAN, County Auditor of King County, Respondent.*

COUNTY COMMISSIONERS — COMPENSATION — RIGHT TO MILEAGE — CONSTRUCTION OF STATUTE.

County commissioners are not entitled to charge mileage under Code 1881, § 2870, permitting mileage, since Laws 1889-90, p. 305, § 2,

June, 1896.] Opinion of the Court—DUNBAR, J.

which provides that they "shall receive five dollars per day for each day employed in performance of their duties," expressly declares that its purpose is to fix the salaries of county officers, and that all acts in conflict with its provisions are repealed.

When legislative construction of an act is made by a subsequent legislature and in apparent ignorance of what the law in force really is, such construction can have no force upon the courts, when called upon to construe the act.

Appeal from Superior Court, King County.—Hon. J. W. LANGLEY, Judge. Affirmed.

Cole, Heaton & Dawes, and *W. R. Bell* (*A. E. Griffith*, of counsel), for appellant:

In the construction of statutes the intent of the legislature, gathered from what is embodied and expressed in the entire statutes is the vital part. *Kohn v. Collison*, 27 Atl. 834; *Wilkinson v. Leland*, 2. Pet. 627; *Priestman v. United States*, 4 Dall. 28; *Lau Ow Bew v. United States*, 12 Sup. Ct. 517, *State v. Moore*, 63 N. W. 130; *Inhabitants of Gray v. County Commissioners*, 22 Atl. 376; *Snyder v. Compton*, 28 S. W. 1061.

When the legislature in construing a prior statute say in effect that by the antecedent act a particular right was intended to be conferred, the court will ordinarily respect such declaration, if the language used in the earlier act can be so interpreted without doing violence to its obvious and natural meaning. *Trustees Catholic Church v. Manning*, 19 Atl. 599; *Baxter v. Robertson*, 23 N. W. 711.

A. W. Hastie, for respondent.

The opinion of the court was delivered by

DUNBAR, J.—The question involved in this case is whether county commissioners in counties of the third class can recover mileage from the county at the rate of ten cents for each mile traveled in the discharge of

the duties imposed by the statute, or any mileage at all, in addition to the per diem and allowance of five dollars.

It is conceded by the appellant that the law of 1889-90 (Laws 1889-90, p. 305, § 2), which provides that "the county commissioners in all counties shall receive five dollars per day for each day employed in performance of their duties," if construed literally would prevent the recovery of mileage by the county commissioners, but it is insisted that this statute, when considered with reference to the history of the legislation on this subject, is susceptible of another construction. The law of 1889-90 above referred to is entitled, "An act classifying the counties according to population, enumerating the county officers, fixing the salaries thereof, providing for deputies, collection of fees and payment of salaries;" and the repealing clause (Laws 1889-90, p. 316, § 48) is to the effect that, "all laws or parts of laws in conflict with this act are hereby repealed." It would seem that an act which expressly declared that its purpose was to fix the salaries of county officers, and which did fix them upon a different basis from that on which they had been fixed by a prior law, and which declares that all acts in conflict with its provisions shall be repealed, would work a repeal of all acts fixing the compensation of county officers which are in any way in conflict with the compensation fixed by the act itself; and to determine whether these respective provisions in relation to compensation are in conflict it is only necessary to determine whether or not the compensation in the one is more or less than the compensation fixed in the other.

Under the law of 1854 (Laws p. 420, § 8) which is the earliest enactment on the subject, the county com-

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missioners were entitled to receive three dollars per day for each day necessarily employed in transacting the business of the county, and fifteen cents per mile for every mile traveled in going to and returning from the meetings of said board, or in the discharge of any official duty. This law was changed in 1869, (Laws 1869, p. 304, §8, to read as follows:

“The county commissioners shall each receive five dollars per day for each and every day they may be necessarily employed in transacting the business of the county, and fifteen cents per mile for every mile traveled in going to and returning from the meetings of said board or in the discharge of any official duty.”

It will be noticed that it was thought necessary by the legislature in changing the per diem from three dollars to five, to also enact that the commissioners should be entitled to the mileage of fifteen cents per mile, which was the same mileage provided for in the act of 1854. The act of 1869 was entitled, “An act to provide for the election of county commissioners and defining their duties.” In 1881 (Code 1881, p. 464, § 2670), the law in regard to compensation of county commissioners was again changed to the effect that, “the county commissioners shall each receive four dollars per day for each and every day they may be necessarily employed in transacting the business of the county, and ten cents per mile for every mile traveled in going to and returning from the meetings of said board, or in the discharge of any official duty.” This is the law relied upon by the appellant to sustain his contention that he is entitled to mileage.

Whatever the law may have been prior to 1890, it seems conclusive to our minds that the intention of the act of 1890 was to establish an independent compensation for county commissioners, and that, when this compensation was established at five dollars per

day without a provision for mileage, it must be concluded, even according to the appellant the benefit of all the canons of construction which he has invoked, that it was the intent of the legislature that the per diem should be the exclusive compensation of the commissioner, and that the mileage allowed by the former acts was not intended to be carried forward into the new.

It is insisted by the appellant that the legislative construction has been placed upon the act of 1890 by § 9, page 303 of the laws of 1893, where the legislature provided for a board of construction, and further provided that such board should be allowed the same mileage as is allowed county commissioners for necessary travel in the discharge of their duties, and should not be otherwise paid for their services. If the act which we are called upon to construe had been contemporaneous with the act quoted, the legislative construction would have more effect, but it seems to us plain that the legislature of 1893 was legislating in ignorance of what the law in relation to the compensation of county commissioners really was, and that it can have no force in construing the act of another and prior legislature.

The case of *Cox v. Holmes*, 14 Wash. 255, (44 Pac. 262), we do not think is in point. We are satisfied that under the law as it now exists the commissioner is not entitled to mileage under any circumstances.

The judgment of the lower court will therefore be affirmed.

HOYT, C. J., and SCOTT, ANDERS and GORDON, JJ., concur.

June, 1896.] Opinion of the Court—Hoyt, C. J.

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[No. 2125. Decided June 23, 1896.]

JOHN U. BROOKMAN *et ux.*, Appellants, v. STATE INSURANCE COMPANY OF OREGON, Respondent.

TIME FOR APPEAL—REDUCTION BY STATUTE—WHEN OPERATIVE UPON PENDING APPEALS—REPLEVIN—SUFFICIENCY OF COMPLAINT.

An appeal taken within six months after judgment, pursuant to the appeal act of 1893, is in time, although prior to the taking of the appeal the act of 1895 was passed reducing the time in which an appeal might be taken to ninety days, the latter act, however, not becoming effective until after said appeal had been taken.

Where it appears from the complaint in replevin that plaintiffs have a special property in a certain hay crop, and are entitled to its possession, the complaint is not subject to general demurrer, notwithstanding it may be alleged therein that they hold a mortgage on the crop, if, at the same time, it is made to appear that their right to possession is not dependent upon their title as mortgagees. (*Silsby v. Aldridge*, 1 Wash. 117, distinguished.)

Appeal from Superior Court, King County.—Hon. RICHARD OSBORN, Judge. Reversed.

R. F. Laffoon, for appellants.

Hastings & Stedman, for respondent.

The opinion of the court was delivered by

Hoyt, C. J.—Respondent's motion to dismiss the appeal for the reason that it was not taken in time must be denied. It was taken within six months after the rendition of the judgment and before the act reducing the time in which an appeal might be taken to ninety days went into effect, and we are unable to agree with the contention of respondent that the saving clause contained in said act had reference to the date of its passage rather than to the date when it went into effect.

The appeal was from an order sustaining a demurrer

to plaintiffs' amended complaint and from the judgment rendered thereon. The demurrer was general and should have been overruled if the complaint stated a cause of action.

Said complaint is too long for insertion in this opinion and it is sufficient to say that therefrom the following, among other facts, were sufficiently alleged: That the plaintiffs were the owners of a certain farm; that they leased the same to one C. T. B. Hall, reserving to themselves certain rights and privileges as to the hay crop to be grown thereon; that to secure the performance on the part of the said Hall of the conditions of the lease on her part, she, joined by her husband, executed a chattel mortgage upon the growing hay crop; that, under the conditions of the lease and mortgage, plaintiffs were entitled to the possession of the hay crop immediately upon its being harvested, if not before; that upon the crop being so harvested the plaintiffs were by said lease and mortgage authorized to take possession of the crop and sell it, and apply the proceeds to the payment of anything which might be due under the terms of the mortgage; that after the crop had been so harvested the plaintiffs had been requested by the lessee and mortgagors to take possession of the crop, as they could no longer care for and protect it; that plaintiffs had been prevented from taking possession in accordance with the terms of the lease and mortgage, and such request on the part of the lessee and mortgagors, by the wrongful action of the defendant; that the defendant had no right whatever in the property; that it wrongfully withheld the same from the plaintiffs; that demand for possession had been made before the suit was commenced. And, in our opinion, if these allegations

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were true the plaintiffs were entitled to possession of the property.

It is probable that the superior court sustained the demurrer upon the authority of the case of *Silsby v. Aldridge*, 1 Wash. 117 (23 Pac. 836), and other like cases decided by this court. But an examination will show that in none of these cases was any such question decided as is here presented. Here the exact claim of the plaintiffs was fully set out in the complaint, and therefrom it clearly appeared that they had a special property in the hay crop, and were entitled to its possession, and these claims established by proofs would have been sufficient to authorize a judgment awarding plaintiffs the possession of the property that they might protect their interest therein.

There was no question of variance between the allegations of the complaint and the proof offered upon the trial, and since the right to possession is sufficient to maintain the action of replevin, a complaint which alleged facts showing the plaintiffs to have been entitled to possession and containing no allegations inconsistent with the assertion of such right stated a cause of action against one alleged to be wrongfully withholding such possession. The complaint in the case at bar not only contained the direct allegation that plaintiffs were entitled to possession, but set out fully facts which showed that such allegation was warranted by the circumstances surrounding the transaction out of which the rights involved in the action arose.

There has been an attempt on the part of respondent to sustain the action of the court below by reason of the alleged invalidity of the mortgage when attacked by creditors of the mortgagors, but there is nothing in the record upon which any contention in

that regard can be founded. It nowhere appears that the respondent was a creditor of the mortgagors or either of them. All that can be gathered from the complaint is that it was an interloper, and it was directly charged therein that it had no interest whatever in the property, and that the person through whom they had obtained possession had no interest therein. Under these allegations any question which might be raised by a creditor of the mortgagors was not involved in the determination of the issue of law presented by the general demurrer to the complaint.

The judgment will be reversed and the cause remanded for further proceedings in accordance with this opinion.

SCOTT, ANDERS, DUNBAR and GORDON, JJ., concur.

Per Curiam.—The argument in the petition for rehearing filed in this cause is founded entirely upon an alleged mistake of facts by the court in assuming that the lease and chattel mortgage referred to in the complaint were delivered as a part of the same transaction and should be construed together. In making an argument upon this foundation, petitioners must have overlooked certain allegations in the complaint. Every allegation contained therein which was well pleaded was confessed by the demurrer and must be taken as true. In the third paragraph of said complaint, after a statement as to the execution of the lease, it was alleged as follows:

“To secure said sums and the faithful performance of the covenants and conditions of said lease, and to secure the payment of a certain promissory note made by said C. J. Hall and George B. Hall to the plaintiff herein, John U. Brookman, and which the lessee, C. T. B. Hall, assumed and agreed to pay as a part of the consideration for the making of said lease, and to maintain the control and management of the

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Syllabus.

growing crop of hay in the plaintiffs, thereafter, on the 27th day of April, 1894, at the time of the delivery of the said instrument of lease and as a part of the same transaction, the said C. T. B. Hall, joined by her husband, Charles J. Hall, made, executed and delivered to the plaintiffs a certain contract and indenture of mortgage."

Which allegation taken as true made it the duty of this court to assume the facts to be as stated in its former opinion, that the delivery of the lease and mortgage constituted a part of a single transaction, and that such instruments must be construed together.

It follows that the assumption of a mistake as to the facts was without foundation.

Petition denied.

[No. 2158. Decided June 23, 1896.]

FANNIE BARKLEY, *Appellant*, v. P. W. BARTON *et al.*,
Respondents.

15	38
22	476
15	38
84	411

APPEAL—SERVICE OF STATEMENT OF FACTS—TIME OF APPEAL—ESTOPPEL—WHEN FINDINGS UNNECESSARY.

Service upon respondent of a copy of a statement of facts prior to the filing of the original in the clerk's office, is ineffectual for purposes of appeal.

Where an appeal has been taken from a judgment, the appellant is estopped to afterwards take advantage of the fact that no copy of the judgment had been served upon him.

Neither findings of fact nor conclusions of law are required on the part of a trial court when it grants a motion for a non suit in a jury case.

Appeal from Superior Court, Snohomish County.
—Hon. JOHN C. DENNEY, Judge. Affirmed.

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H. A. Porter, for appellant.

Allen & Powell, for Respondent.

The opinion of the court was delivered by

Horr, C. J.—Respondents have filed a motion to strike the statement of facts for the reason that a copy thereof was not served upon them as required by law. It appears from the record that the statement was first served on the 13th day of May, 1895, and that it was not filed until May 14, 1895, and under the authority of *Erickson v. Erickson*, 11 Wash. 76 (39 Pac. 241), and *Boyle v. Great Northern Ry. Co.*, 13 Wash. 383 (43 Pac. 344), it must be held that such service was ineffectual. In January, 1896, further service of the statement was attempted to be made upon respondents, but this service was not in time, especially in the absence of any order from the superior court extending the time for filing and serving the statement of facts. The only ground upon which it is claimed by the appellant that this service was in time was that there had been no copy of the judgment served upon her, but she, having appealed therefrom three or four months before the date of this attempted service could not thereafter rely upon the provision as to the service of a copy of the judgment, even if the state of the record were such that she would be in a position to take advantage of the want of service, if she had not served such notice of appeal. It follows that the motion of the respondents must be granted.

The sufficiency of the pleadings has not been challenged. There is only one assignment of error which could under any circumstances avail appellant after the statement of facts is stricken from the record. That one is founded upon the failure of the court to

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make findings of fact and law, and since in our opinion no findings of fact were necessary such claim of error is without force. The case was on trial before a jury and at the close of plaintiff's case a motion for a non suit was granted. Under these circumstances judgment of dismissal would follow as a matter of course and no findings of fact or law were required on the part of the trial court.

The judgment will be affirmed.

ANDERS, SCOTT, DUNBAR and GORDON, JJ., concur.

[No 2182. Decided June 23, 1896.]

MAGGIE SECOR *et al.*, Appellants, v. THE OREGON IMPROVEMENT COMPANY, Respondent.

15	35
20	296
15	36
40	636

TRIAL—EVIDENCE RESPONSIVE TO ISSUES—INSTRUCTIONS.

Where no attack has been made upon an answer to a complaint in the lower court, the defendant is entitled to have the jury charged upon any phase of the case as made by the evidence, which is responsive to the issues.

Errors growing out of a charge are always to be disregarded when the verdict is so plainly in accordance with the evidence that it follows as a conclusion of law thereon.

Appeal from Superior Court, King County.—Hon. RICHARD OSBORN, Judge. Affirmed.

W. H. Thompson, E. P. Edsen, and John E. Humphries, for appellants.

S. H. Piles, for respondent.

The opinion of the court was delivered by

GORDON, J.—Appellant is the widow of William Secor, and as such, and as the guardian *ad litem* of

her minor child, brought this action to recover damages sustained by reason of the death of her husband, which was due to a casualty occurring in the coal mines of the respondent located at Franklin, as a result of which calamity thirty-seven lives were lost. A statement of the circumstances attending the disaster is set forth in the case of *Pugh v. Oregon Improvement Co.*, 14 Wash. 331 (44 Pac. 547).

The pleadings in the present case are, with the exception of names, identical with the pleadings in that case. Upon trial the jury returned a verdict for the respondent (defendant below) and the motion of appellant (plaintiff below) for a new trial having been overruled, judgment was entered upon the verdict, from which the plaintiff has appealed.

The errors relied upon for a reversal relate wholly to the charge given to the jury upon the trial. It is further claimed that there is no sufficient plea of contributory negligence in the case, that the defenses attempted to be set out are inconsistent, and that the legal effect of the attempted affirmative defenses amounts only to a denial. In reference to these objections to the pleadings we observe that no attack was made upon the answer in the lower court. The answer, after denying specifically nearly all of the material allegations of the complaint, sets out affirmatively :

(1). "That the death of said Secor was caused and occasioned solely by his own want of care and skill and lack of forethought in not immediately leaving said mine when notified, and on discovering that the same was on fire, and not through any carelessness, negligence or want of skill on the part of this defendant, its agents, servants or employees."

(2). "That the death of said Secor was caused and occasioned by a risk incident to the employment of

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said Secor as a miner, and was a risk assumed by him in entering and remaining in the employ of defendant."

(3). "That his death was caused by the carelessness, negligence, or mistaken judgment of fellow-servants of said Secor."

To this answer no motion or demurrer was interposed in the lower court, nor was it objected upon trial that it was insufficient in any particular, and it was the right of the defendant to have the court instruct the jury upon any phase of the case as made by the evidence. It follows that the objections we are now considering cannot avail the appellant. Moreover, this court held in the *Pugh case* that similar defenses contained in the answer therein were well pleaded.

In relation to the alleged errors arising out of the court's charge we deem it sufficient to say that this case (as made by the proofs) differs in no essential feature from the *Pugh case*, save only that the undisputed testimony shows that Secor was working at a point where the first alarm given of the fire must have reached him, and from which he had ample time to pass in safety to the outside of the mine had he sought to do so. There was also uncontradicted testimony tending to show that he stopped at the fire. We held in the *Pugh case* that Pugh's negligence in neglecting to leave the mine, which he might have done with safety after having been warned of the fire, directly contributed to the result, and hence that a recovery could not be sustained. And what is there said is applicable to the present case upon the evidence. It follows, therefore, that the verdict in this case was right, regardless of any error (if error there was) in the charge.

In the very recent case of *Davis v. Gilliam*, 14

Wash. 206 (44 Pac. 119), this court held that errors growing out of a charge are always to be disregarded when the verdict is so plainly in accordance with the evidence that it follows as a conclusion of law thereon. We may add, however, that the charge, when considered as a whole, was as favorable to the appellant as the law entitled her to, and as it is not apparent that any prejudicial error was committed by the court below, the judgment will be affirmed.

HOYT, C. J., and SCOTT, DUNBAR and ANDERS, JJ., concur.

[No. 2202. Decided June 24, 1896.]

THE UNITED STATES SAVINGS AND LOAN COMPANY, *Respondent*, v. THOMAS E. CADE *et ux.*, *Appellants*.

FORECLOSURE OF MORTGAGE TO BUILDING ASSOCIATION — CHANGE OF CORPORATE NAME — EVIDENCE — WHEN DEFAULT ACCRUES.

In the foreclosure of a mortgage to a corporation, the admission of other than record proof as to the change of name of the corporation from that stated in the mortgage to the one under which the action was prosecuted is not prejudicial error, when the record also shows a finding, without an exception to it, that "the plaintiff company was and now is the owner and holder of said mortgage."

In the foreclosure of a mortgage by a loan and building company the certificate of stock issued by it to defendant, with his assignment of the same to the company, is admissible in evidence, when reference thereto is made in the note and mortgage.

Where a note and mortgage given to a loan and building company provide that in case the maker fails to pay any installment of interest or make any monthly payment on certain stock in the company, which had been issued to him and assigned to the company as further security, for the period of three months after the same shall become due, then the whole sum with interest shall upon the election of the company become due and payable, the default does not become fixed for the purposes of the adjustment of the account be-

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tween the parties, until the company elects to declare the entire amount due and payable, but until such time the contract continues in force entitling the company to accruing interest and payments upon the certificates of stock assigned to it.

Appeal from Superior Court, Whatcom County.—
Hon. JOHN R. WINN, Judge. Affirmed.

D. W. Freeman, and *S. M. Bruce*, for appellants.

Dorr, Hadley & Hadley, for respondent:

Two or more writings must be deemed one instrument, and as forming but parts of the same contract when executed with reference to the same subject matter. *Dunlap's Adm'r v. Wright*, 62 Am. Dec. 506; *Newbegin v. Langley*, 63 Am. Dec. 612; *Herbst v. Lowe*, 26 N. W. 751; *Gregory v. Marks*, 10 Fed. Cas. 1194; *Wheeler & Wilson Mfg. Co. v. Howard*, 28 Fed. 741.

Where a mortgage provides that upon default in the payment of either of the notes secured thereby all shall become "immediately due, at the option of the holder," "immediately due" means "immediately upon or after the holder's election," and he is not bound to elect immediately after default. *Wheeler & Wilson Mfg. Co. v. Howard*, 28 Fed. 741; *Lowenstein v. Phelan*, 22 N. W. 561; 2 Jones, Mortgages, (4th ed.) § 1182.

The opinion of the court was delivered by

Horr, C. J.—It was alleged in the complaint that the plaintiff's corporate name was at all times during the month of April, 1891, and thence afterwards until the month of June, 1892, "The United States Savings, Loan and Building Company;" that in said month of June its name was changed to "The United Sates Savings and Loan Company," by an amendment to

its articles of incorporation duly made in compliance with the laws of the state of Minnesota. This action was brought to foreclose a mortgage alleged to have been made by appellants to plaintiff under the name first above set out, and the first claim of error is that the court erred in admitting other than record proof as to the change of the name of the corporation from that stated in the mortgage to the one under which the action was prosecuted. This objection was purely technical, and under the circumstances disclosed by the record was not so material as to authorize a reversal, even if the appellants were in a situation to avail themselves of any error which might have been committed in the admission of such evidence.

The ninth finding of fact was in the following language: "That at the beginning of this action the plaintiff company was and now is the owner and holder of said mortgage;" and no exception to such finding was taken by the appellants. It must therefore be presumed that they were satisfied with the facts found therein, and if they were they were in no manner injured by the error, if any, in the admission of proof as to the change in the corporate name. If the plaintiff was a corporation and was the owner and holder of the mortgage, the question as to any change of name under which the corporation might have been authorized to do business was entirely immaterial.

The next claim of error grows out of the admission of a certain certificate of stock issued by the plaintiff and the assignment thereof, the claim being that nothing outside of the mortgage and note secured thereby was competent evidence. But in view of the fact that reference was made in the mortgage and note to the issuing of this stock by the plaintiff and the

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holding thereof by the appellant T. E. Cade, the certificate which evidences the issue was competent evidence upon the trial, and likewise was the assignment thereof by said appellant.

The third assignment of error grows out of the claim that by the terms of the note and mortgage it was the duty of the plaintiff to proceed to foreclose immediately upon default being made by the appellants in the performance of any of the conditions of said note and mortgage, or in the payment of the installments which came due upon the stock issued in connection with the making of the loan to secure which the note and mortgage were given; that for that reason the account between the plaintiff and appellants should be adjusted as of the date of such default without reference to installments which by the terms of the contract thereafter became due and payable by appellant T. E. Cade to the plaintiff. This contention is founded upon language contained in the note to the following effect :

“If the maker hereof fails to make any monthly payments on said stock or pay any installment of interest for the period of three months after the same is due, then the whole amount of this note shall become due and payable.”

And the following language contained in the mortgage:

“But if default be made in the payment of installments of interest thereon for the period of three months after the same shall become due, then and in either or any such case, the whole principal sum or sums secured by this mortgage with interest thereon secured up to the time of such default shall, at the election of the second party, become thereupon due and payable immediately upon such default.”

But, in our opinion, the construction of these

clauses contended for by appellants is not a reasonable one. The reasonable construction thereof, when taken in connection with the other provisions of the contract of which they formed a part, is that though the right to declare a default became absolute in the plaintiff at the expiration of three months after the failure on the part of the appellants to perform any of the conditions of the contract, the default itself did not become fixed for the purposes of the adjustment of the account between the parties until advantage had been taken by the plaintiff of its right to declare the entire amount due and payable. Any other construction would make of the contract one which under ordinary conditions would compel such a course of action on the part of the plaintiff as to bear with harshness upon the mortgagors.

While the contract was in force the plaintiff was not only entitled to interest upon the note at the rate specified therein, but was also entitled to have such payments made upon the certificate of stock which had been assigned to it absolutely by said appellant, as well as that held by it as collateral to the loan; and to have such installments secured by the mortgage, as well as the principal and interest specified in the note; and if, after the right to declare a default had accrued, it was to be deprived of the benefits of its contract excepting as to the payment of the principal and interest and installments then due and payable, it would be compelled to at once proceed to foreclose to prevent the loss of a large portion of the profits of its contract.

In our opinion it must be held that the intention of the parties was that the contract should be continued and should be in full force until such time as the plaintiff saw fit to assert its right to declare it termin-

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ated for non-compliance with the conditions on the part of the mortgagors. It follows that the court was justified, in stating the account between the parties, to include not only the principal and interest upon the note, but also the unpaid installments upon the stock up to the time of plaintiff's election to declare the contract terminated and the whole amount of principal and interest due. And if the court committed any error in the premises it was in refusing to include as a part of the amount due from the mortgagors the fines which under the terms of the contract had been imposed for non-payment of installments upon the stock as they became due.

The fourth claim of error grows out of the action of the court in allowing the appellant T. E. Cade only \$400 of his claim of \$550 for legal services rendered to the plaintiff. But there is nothing in the record which would justify us in interfering with the finding of the court as to the amount to which said appellant was entitled on account of such legal services.

There is no error in the record of which the appellants can complain, and the judgment and decree will be affirmed.

ANDERS, DUNBAR and GORDON, JJ., concur.

[No. 2123. Decided June 25, 1896.]

ROBERT WINGATE, *Receiver, Appellant*, v. N. G. BLALOCK *et al., Respondents*.

NEGOTIABLE INSTRUMENTS — MAKER OR SURETY — PAROL EVIDENCE.

The makers of a promissory note cannot show by parol that they all signed it as sureties, especially when there is an affirmative statement in the note that the parties signed as principals.

Appeal from Superior Court, Pierce County. — Hon. W. H. PRITCHARD, Judge. Reversed.

Doolittle & Fogg, for appellant.

W. C. Jones, Attorney General, and *James A. Haight*, for respondents.

The opinion of the court was delivered by

DUNBAR, J. — The appellant, as receiver of the Merchants' National Bank of Tacoma, brought an action on a certain promissory note made by the respondents in favor of the Merchants' National Bank of Tacoma, for the sum of \$1,273.50, with interest. The note recited that the respondents were principals, the first two lines of the note being as follows :

"January 31st, 1895, after date, without grace, we as principals, promise to pay to the order of the Merchants' National Bank of Tacoma," etc.

And was signed by the respondents individually as principals ordinarily sign. On the back of the note was the following memorandum :

"The within note is a renewal of a note for \$1,213.00, dated Sept. 26th, 1892, with interest at 10 per cent. per annum. Said note originated in an advance of \$1,000 (which has been increased by accumulated interest) made by the Merchants' National Bank of

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Tacoma to the World's Fair Ass'n. of Washington."

The defendants answered that the Merchants' National Bank of Tacoma advanced to, and for the use of the state of Washington, for and on account of the World's Fair, the money in question, and received a promissory note of defendants as evidence of the indebtedness of the state of Washington, which note had stamped across its face the words "Washington World's Fair Commission;" that at the time the money was advanced, the payors and payee of said note regarded the transaction as an advance of money to the state of Washington, that said money was advanced on the faith of and for the consideration that it would be expended to and for the use of the state of Washington, through expenditures on account of Washington in connection with the World's Fair, and that the state would be responsible for its payment; that the present note now sued on was given by defendants in renewal of the note first above mentioned, and in view of that consideration; that when the note sued on matured, the state of Washington had \$3,000 on deposit in payee's bank, which its receiver had in his possession when he brought this suit against the defendants, and that the bank and its receiver refuse to pay over said money to the state of Washington. The state of Washington intervened and set up in answer the same state of facts alleged by the answer of the respondents, the makers of the note, and alleged in addition that unless it was permitted to set off a portion of its deposit against the note sued on it would lose equal to 20 per cent or more of said note, and prayed that it might set off against said note out of its deposit a sum equal to the amount due thereon. In addition it alleged that none of the signers of the note nor the bank understood that the makers of the note were as-

suming any liability other than that of surety for the state of Washington, and further, that said money was used as it was intended to be used, for, and in behalf of, the state of Washington.

To these respective answers the appellant interposed a demurrer to the effect that they did not state facts sufficient to constitute a defense to the action, which demurrer was overruled, and the appellant, relying upon his demurrer, has appealed to this court. Outside of the question as to whether the state, assuming it to be a proper party to this suit and a depositor in the bank, could compel the bank to apply the deposit to the payment of the note, we think this judgment will have to be reversed. While it is true that this court, in common with many others, has held that it was competent for one who signed a note as principal to show that he really signed as surety, yet we think no court has gone so far as to hold that all the makers of a note may show that they signed as sureties, which would destroy the idea that there was any principal to the note at all,—and especially when there was an affirmative statement in the note that the parties signed as principals. This, we think, without doubt would resolve itself into allowing an oral contract to be substituted for a written one, and the allegations of this answer certainly do vary the terms of the written contract. It is not a payment by the state which is pleaded,—of course a payment could be pleaded whether the payment was made by the parties to the note or by a stranger,—but all that is claimed by the state here is simply a right to an offset, for the state could have withdrawn its deposit any time, and the bank could not have prevented such withdrawal, and had no hold on the deposit of the state by reason of the execution of the note by the respondents. In

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other words, the bank had no recourse on the state and could not have recovered from it by a suit on the note for the reason that the state was in no sense a party to the contract.

We think there are no authorities that would warrant us in holding that the matters set up in the answer, either of the state or of the respondents, were a sufficient defense to the promissory note, where the makers themselves had seen fit to incorporate in the body of the note the plain and unequivocal statement that they were the principals, and where, if the allegations of the answer were true, there would be no principal to the note. The judgment will be reversed and the cause remanded with instructions to the lower court to sustain the demurrers to the answers.

HOYT, C. J., and ANDERS and GORDON, JJ., concur.

[No. 2220. Decided June 25, 1896.]

R. J. ANDERSON, *Respondent*, v. WHATCOM COUNTY,
Appellant.

CONSTITUTIONAL LAW — SELF-EXECUTING PROVISIONS — TITLE OF ACTS —
COMPENSATION OF JUSTICES OF PEACE.

Art. 4, § 10, of the constitution, providing that, in incorporated cities or towns having more than five thousand inhabitants, the justices of the peace shall receive such salary as may be provided by law, is self-executing with reference to the matter of population, merely the matter of fixing salaries being referred to the legislature, and the courts are justified in receiving testimony to determine the amount of population.

The act of March 15, 1893, entitled "An act to provide for the economical management of county affairs," and providing that the salary allowed by law to an officer shall not exceed the amount of the legal fees collected on account of such office, does not effect a

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repeal of the act of February 7, 1891, fixing the salaries of justices of the peace in incorporated cities having more than five thousand inhabitants, since such subject is not embraced in the title of the act of March 15, 1893, and would be unconstitutional so far as effecting that object is concerned.

Appeal from Superior Court, Whatcom County.
Hon. JOHN R. WINN, Judge. Affirmed.

G. V. Alexander, for appellant.

Newman & Howard, for respondent.

The opinion of the court was delivered by

DUNBAR, J.—This case involves the right of the justices of the peace in New Whatcom precinct to receive the salary provided by law for cities of the third class. The justice who is the respondent here filed with the auditor of the county of Whatcom his claim for his salary for the month of July, 1895, for the sum of \$100, and said claim was audited by the auditor and presented for allowance to the county commissioners of said county, by whom it was rejected for the alleged reason that the said justice was not entitled to any compensation in excess of the fees earned by him, which said fees were ascertained and tendered.

The action was brought against the county by the respondent for the salary claimed, and judgment was rendered in his favor, from which judgment an appeal is taken by the county of Whatcom to this court. All the essential facts relating to the election and qualification of the respondent are admitted, so that it will not be necessary to discuss anything but the law governing the case. Many assignments of error were made by the appellant, but there are four principal grounds upon which appellant rests its defense, viz:

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(1.) That the city of New Whatcom, constituting the precinct in which respondent is justice of the peace, is not an incorporated city or town of the third class, having more than five thousand inhabitants as shown by the last state or federal census, and, therefore, respondent is not entitled under the law to receive any salary from the appellant county, not being a justice contemplated by section 1, page 8, of the Laws of Washington, 1891.

(2.) That respondent is an officer receiving compensation from the appellant county who is required to exact fees for the performance of the duties of his office, and therefore is not entitled to any compensation in excess of the fees collected by him as such officer.

(3.) That at the time of the presentation of the claim by the respondent the county had exceeded its limit of indebtedness under the constitution, and that no money was in the treasury available for the payment of respondent's alleged salary.

(4.) That appellant has paid respondent in full on account of his services, by issuing him a warrant in the sum of \$39.45, which was the amount of the fees collected by the justice in said month.

Section 10 of article 4 of the constitution provides that in incorporated cities or towns having more than five thousand inhabitants, the justices of the peace shall receive such salary as may be provided by law and shall receive no fees for their own use. The justice's salary act of February 7, 1891, page 8, provides that justices of the peace in incorporated cities and towns of the third class having more than five thousand inhabitants as shown by the last state or federal census shall receive an annual salary of \$1,200. The contention of the appellant is that this

act must be construed literally, and that either the state or the federal census is the sole criterion for a determination of the population in all cases, while the respondent contends that the question of population of cities of the third class is a question of fact to be ascertained like any other fact in the case. There has been no federal census taken since the organization of New Whatcom precinct.

The act of February 7, 1891, § 1, provides that—

“The justices of the peace in incorporated cities and towns of the first class shall receive an annual salary of two thousand dollars; justices of the peace in incorporated cities and towns of the second class shall receive an annual salary of eighteen hundred dollars; and justices of the peace in incorporated cities and towns of the third class having more than five thousand inhabitants, as shown by the last state or federal census, shall receive an annual salary of twelve hundred dollars.”

The last federal census was taken in May, 1890, before the organization of the city of New Whatcom, and there has been no state census taken of the inhabitants of said city, and the legislature has failed to make provisions for taking such a census as provided for in art. 2, § 3, of the constitution. So that the essential question in this case is whether the constitutional provision in relation to salaries of justices of the peace in cities containing a population of five thousand inhabitants or more is self-executing, or whether it requires legislation to give effect to the constitutional provision. It is insisted by the appellant that this court decided this question in favor of its contention in the case of *Rohde v. Seavey*, 4 Wash. 91 (29 Pac. 768), but while some language may have been used in the opinion in that case, tending to sustain such a contention, we do not think that the

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questions decided there were necessarily involved in the decision of the question now under consideration. An examination of the briefs in that case shows that the questions were meagerly presented, and that the question of the self-executing power of the constitution was not presented to the court at all, so that we feel justified in entering upon the discussion of this case as a new question, and we are of the opinion that the provision of the constitution in relation to the salaries of justices of the peace in cities or towns having more than five thousand inhabitants is self-executing.

"A constitutional provision," says Mr. Cooley in his work on Constitutional Limitations (5th ed.), p. 100, "may be said to be self-executing if it supplies a sufficient rule by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced; and it is not self-executing when it merely indicates principles, without laying down rules by means of which those principles may be given the force of law."

It seems to us that under this constitutional provision it becomes a fixed fact that cities or towns having more than five thousand inhabitants are entitled to salaried justices of the peace; that that fact and the ascertainment of it is directed to the court and not to the legislature; that to the legislature was directed the fixing of the salary, and the legislature in this instance has fixed the salary under the power given to it by the constitution. The learned author above quoted cited the provisions exempting homesteads from forced sale for the satisfaction of debts as an illustration of self-executing provisions, and says that

"Where, as in California, the constitution declares that 'the legislature shall protect by law from forced

sale a certain portion of the homestead and other property of all heads of families,' the dependence of the provision on subsequent legislative action is manifest. But where, as in some other states, the constitution defines the extent, in acres or amount, that shall be deemed to constitute a homestead, and expressly exempts from any forced sale what is thus defined, a rule is prescribed which is capable of enforcement."

We think that in the case under discussion a rule is equally prescribed which is capable of enforcement. In the case of the homestead the ascertainment of the number of acres or the amount will be determined by the court, and in this case the ascertainment of the fact of the amount of population in the town or city is for the courts and not for the legislature. As is said by the author above quoted,

"Even in such cases, legislation may be desirable, by way of providing convenient remedies for the protection of the right secured, or of regulating the claim of the right so that its exact limits may be known and understood; but all such legislation must be subordinate to the constitutional provision, and in furtherance of its purpose, and must not in any particular attempt to narrow or embarrass it."

In this instance the enactment of the legislature might absolutely destroy the right conferred by the constitution. The legislature has not seen fit to provide for the state census, so that under the statute law as it exists the only means of ascertainment of the population of the city is the federal census, which is taken only every ten years. It might very reasonably occur that a city which did not have quite the requisite five thousand population at the time of the taking of the federal census in 1890 might within six months or a year have the requisite population, and yet this fact could not receive a judicial determination

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or announcement for the period of nine or ten years, so that, if the law should receive this construction, its effect would be to destroy or limit the right which the constitution gave. The test provided for by the legislature must be a reasonable one—one which would carry into effect the constitutional guarantee instead of destroying it. It was held by the supreme court of California in the case of *People v. Hoge*, 55 Cal. 612, that the constitutional provision that—

“Any city containing a population of more than one hundred thousand inhabitants, may frame a charter for its own government, etc., is self-acting and does not need legislation to give it effect.”

In discussing the question the court, says:

“The constitution nowhere provides either expressly or by implication for such legislative interference, and the construction placed upon the provision of the constitution under discussion might result in entirely defeating its operation. If this ground can be sustained, it would result that hostile action, or even *non-action* on the part of the legislature, would prevent the inhabitants of the city from exercising a power expressly given to them in clear and unmistakable language by the constitution.”

It was evidently the intention of the framers of the constitution to provide in harmony with the policy adopted by them of doing away with the fee system, for officers in large cities and towns, and these positive declarations in the constitution cannot be abrogated or destroyed by unreasonable action or non-action on the part of the legislature. In *Willis v. Mabon*, 48 Minn. 140 (31 Am. St. Rep. 626, 50 N. W. 1110), it was held that an article of the constitution providing that—

“Each stockholder in any corporation (excepting those organized for the purpose of carrying on any

kind of manufacturing or mechanical business, shall be liable to the amount of stock held or owned by him,' is self-executing,"

and the court in that case, in adopting a test said:

"The question in every case is whether the language of a constitutional provision is addressed to the courts or the legislature,—does it indicate that it was intended as a present enactment, complete in itself as definitive legislation, or does it contemplate subsequent legislation to carry it into effect? This is to be determined from a consideration both of the language used and of the intrinsic nature of the provision itself. If the nature and extent of the right conferred and of the liability imposed is fixed by the provision itself, so that they can be determined by the examination and construction of its own terms, and there is no language used indicating that the subject is referred to the legislature for action, then the provision should be construed as self-executing and its language as addressed to the courts."

In this case it is manifest that the provision can be determined by competent testimony outside of any legislative enactment, and that all the language of the constitution indicating that the object is referred to the legislature for action is with reference to fixing the salary, and the fact that this particular portion alone of the subject is especially referred to the legislature excludes the idea that the ascertainment of the population was also referred to the legislature. Many cases have been cited by the respondent which by analogy sustain the idea that the provision of the constitution is self-executing: viz., cases with reference to elections, qualifications of voters, etc., but while they undoubtedly do sustain the contention, the law is well settled without their aid, and we therefore hold that the provision of the constitution with reference to the population is self-executing, and that the

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court was therefore justified in receiving the testimony which it did receive to determine this fact.

The second contention of appellant is based on the act of March 15, 1893 (p. 427, Laws 1893). This is an act entitled "An act to provide for the economical management of county affairs." Section 2 provides that

"No deputies or assistance of any kind shall be allowed to any officer or person receiving compensation from a county unless the same is necessary. No higher compensation shall be allowed for any deputy of, or assistance for, such officer or person, than is necessary. No other expenditure for or connected with such officer or person or his office or employment, or the performance of his official duties, or any of them, than shall be necessary. In case the payment of any fee or fees is required for the performance of any duty of such officer or person, the total amount allowed and expended by any board of county commissioners for, on account of, or connected with such person or officer; his office or employment, and the performance of the duties thereof, including the salary allowed by law to such officer or person, shall not exceed the amount of the legal fees collected on account of such office or employment and the performance of the duties thereof."

It is contended that this act repeals the act of February 7, 1891, which is entitled "An act fixing the salaries of justices of the peace and constables, in incorporated cities and towns having more than five thousand inhabitants," etc., and that its effect is to reduce the salary of the officer to the amount represented by the fees collected by such officer, while the contention of the respondent is that the act was intended to operate only upon deputies and outside assistance employed by the county commissioners. Whatever may have been the intention of the legislature, and it must be conceded that if the law has

the effect contended for it by the appellant so far as its application to justices of the peace is concerned, it would equally apply to all the county officers excepting to the fees of county attorney, which is specially excepted by the provisions of the act, we are satisfied that, if it was intended to change the salaries of county officers, the title is obnoxious to the constitutional provision that no bill shall embrace more than one subject, and that subject expressed in the title. The title to this act is "An act to provide for the economical management of county affairs." We do not think this gives a legal notice of the reduction or change of salaries. Economical management of county affairs would convey the idea of the management on the part of the county commissioners, or of somebody who had power or discretion to manage the business affairs of the county, and would not suggest to the mind the question of salaries in any respect. It could not reasonably be concluded that an act providing for economical management of county affairs could work a repeal of an act entitled "An act fixing the salaries of justices of the peace and constables," so that if it was the intention of the legislature to change the salaries of county officers, that intention is not foreshadowed by the title to the act, and would therefore be unconstitutional so far as effecting that object is concerned.

As to the third contention, we think that, under the rule announced by this court in *Spokane & Eastern Trust Company v. Lavigne*, Treasurer of Stevens county, 14 Wash. 681 (45 Pac. 664), decided June 15, 1896, the finding of the court that there was sufficient incorporated funds to pay this claim must be sustained. This holding in no way conflicts with the holdings of the court in the cases of *Mason v. Purdy*,

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11 Wash. 591 (40 Pac. 130); *State, ex rel. Barton, v. Hopkins*, 12 Wash. 602 (41 Pac. 906); *Eidemiller v. Tacoma*, 14 Wash. 376 (44 Pac. 877). The first case simply went to the power of the county commissioners to transfer funds in the absence of legislative authority, and the case of *Eidemiller v. Tacoma, supra*, held that the law was unconstitutional as applied to warrants that were issued prior to the act authorizing the transfer of moneys from the general fund to the salary fund as being in violation of contract. The fourth contention is disposed of by what we have said in relation to the other three.

We have examined the many errors assigned, and believing that no substantial error was committed by the court in any respect, the judgment will be affirmed.

HOYT, C. J., and SCOTT, ANDERS and GORDON, JJ., concur.

[No 2230. Decided June 25, 1896.]

ELIZABETH W. SACKMAN *et al.*, *Appellants*, v. JOHN A. CAMPBELL, *Executor, et al.*, *Respondents*.

IMPLIED TRUST — ENFORCEMENT — PLEADING — LACHES — RESCISSION OF CONTRACT.

In an action by stepchildren against the executor of their stepfather's estate to have same declared a trust in their favor on the ground that some fifty years before in the year 1842, while they were small children, he had married their mother and had taken the proceeds of their father's estate amounting to \$5000, and had during half a century so invested it as to realize an estate worth several millions, the complaint is subject to demurrer when it appears that plaintiffs had never pressed their claims for a period of over thirty years after attaining their majority, and contains the bare allegation as a reason for such laches, that they had no knowledge of their rights until the year 1891, their stepfather having concealed the

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facts from them and claimed the ownership of the property, but nothing appearing to show fraudulent concealment on his part.

In such a case, in order to avoid the charge of laches, the complaint should make a clear and explicit statement of all matters connected with their failure to assert their rights at an earlier date, including the source of their final knowledge as to their rights, when and how obtained, etc.

A complaint by heirs, which asks the rescission of a contract for the division of property of a decedent's estate, on the ground of false representations and coercion, is demurrable when it appears from the facts pleaded that the parties were dealing at arms' length and that the parties seeking rescission had ample opportunity to know the amount and value of the property to which they were entitled at the time of the contract; and when it further appears that the alleged coercion was a threat of the other party to resign as administrator and delay the settlement of the estate unless they accepted his proposed compromise of their claims, when the effect of such resignation would have entitled such heirs to appointment in his stead to conduct the settlement of the estate, and there is nothing in the complaint showing that such heirs, who were women of mature years, were deficient in ordinary intelligence or incapacitated from transacting business.

In order to rescind a contract on the ground of fraud, an action therefor should be promptly commenced upon the discovery of the fraud.

The fact that a third party who is interested in a contract for the division of certain property is not a party to its abrogation is not a ground for the rescission of the subsequent contract, when it appears that such third party has never questioned or interfered with the agreement entered into between the other parties.

Appeal from Superior Court, Kitsap County.—Hon. JOHN C. DENNEY, Judge. Affirmed.

Burke, Shepard & Woods, and *James L. Crittenden (J. McGilvra, Sidney M. Van Wyck, Jr., and Solon T. Williams, of counsel)*, for appellants:

The concealment of a fraud prevents time from running against the injured parties. *Yancy v. Cothran*, 32 Fed. 687; *Carr v. Hilton*, 1 Curt. 390; *Bailey v. Glover*, 21 Wall. 342; *Upton v. McLaughlin*, 105 U. S.

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Argument of Counsel.

640: *Martin v. Smith*, 1 Dill. 86; *Cook v. Sherman*, 20 Fed. 168.

Trust property may be followed and recovered so long as it can be identified or traced, and no laches can be claimed by a trustee or his executor, when the trustee has fraudulently concealed the facts as to the trust. *Charter v. Trevelyan*, 11 Clark & Fin. 714; *Longworth v. Hunt*, 11 Ohio St. 194; *Moxon v. Payne*, L. R. 8 Ch. App. 881; *Duff v. Duff*, 71 Cal. 513; *Pierce v. Wilson*, 34 Ala. 956; *Beaumont v. Boulton*, 5 Ves. Jr. 485; *Butler v. Haskell*, 4 Desaus. Eq. 651; *Earl of Hardwicke v. Vernon*, 14 Ves. Jr. 504; *McDonald v. McDonald*, 1 Bligh, 315; *Sweet v. Hale*, Finch, 384. The law looks with special lenity upon any delay of one relative to sue another. *Yeaton v. Yeaton*, 4 Ill. App. 579; *Paschall v. Hinderer*, 28 Ohio St. 568; *Laver v. Felder*, 9 Jur. N. S. 190.

Trustee must act with highest good faith. The trustee must not only not misrepresent, but he must speak. He must tell all he knows and tell the truth to the beneficiary. Nor can he acquire any personal interest in the trust estate so long as the trust relation continues. Lewin, Trusts, 463; *Ex parte Lacey*, 6 Ves. Jr. 625; *Hatch v. Hatch*, 9 Ves. Jr. 292; *Ex Parte James*, 8 Ves. Jr. 345; *Michoud v. Girod*, 4 How. (U. S). 566; *Moore v. Moore*, 4 Sandf. Ch. 37; *Boyd v. Hawkins*, 2 Dev. Eq. 195; *Eberts v. Eberts* 55 Pa. St. 110; *Young v. Hughes*, 32 N. J. Eq. 384; *Fox v. Mackreth*, 1 Leading Cases in Equity (4th Am. ed.), p. 240, American notes; *McCants v. Bee*, 1 McCord Eq. 387; *Howell v. Ransom*, 11 Paige Ch. 541; *Tate v. Williamson*, L. R. 2 Ch. App. Cas. 55; *Hamilton v. Wright*, 9 Clark & F. 111; *Rhodes v. Bate*, L. R. 1 Ch. App. Cas. 256; *Walker v. Symonds*, 3 Swanst. 1.

Misstatements of values avoid trust or compromise

settlements. Wharton, Contracts, §§ 259, 260; *Haygarth v. Waring*, L. R. 12 Eq. Cas. 328; *Grimm v. Byrd*, 32 Grat. 300; *Swimm v. Bush*, 23 Mich., 100; *Picard v. McCormick*, 11 Mich. 68; *Birdsey v. Butterfield*, 34 Wis. 60; *Simar v. Canaday*, 53 N. Y. 306 (13 Am. Rep. 523); *Stover's Administrators v. Wood*, 26 N. J. Eq. 420; *Davis v. Jackson*, 22 Ind. 234; *Fisher v. Mellen*, 103 Mass. 504; *McClellan v. Scott*, 24 Wis. 85. The parties to a compromise contract are burdened with precisely the same obligations of good faith and to impart all necessary information, as exist in the case of trustee and *cestui que trust*. *Perkins v. Gay*, 3 Serg. & R. 331 (7 Am. Dec. 653); *Stapilton v. Stapilton*, 2 Leading Cases in Equity (4th ed.), 1722, American notes; *Gibbons v. Canut*, 4 Ves. Jr. 848; *Gordon v. Gordon*, 3 Swanst. 400; *Wheeler v. Smith*, 9 How. (U. S.) 82; *Stewart v. Ahrenfeldt*, 4 Denio, 190; *Baker v. Spencer*, 47 N. Y. 565; *Barlow v. Insurance Co.*, 4 Metc. 270; *Converse v. Blumrich*, 14 Mich. 112; *Mackellar v. Wallace*, 26 Eng. L. & Eq. 64; *Gilbert v. Endean*, L. R. 9 Ch. Div. 259; *Brooke v. Lord Mostyn*, 2 De G., J. & S. 373; *Smith v. Pincombe*, 3 Macn. & G. 653; *Broderick v. Broderick*, 1 P. Wms. 239; *McCarthy v. De Caix*, 2 Russ & M. 623.

Struve, Allen, Hughes & McMicken, for respondents :

Laches must be explained away by pleadings. *Felix v. Patrick*, 145 U. S. 317; *Wetzel v. Minn. Ry. Transfer Co.*, 65 Fed. 23; *Teall v. Slaven*, 40 Fed. 774; *Wood v. Carpenter*, 101 U. S. 135; *Felix v. Patrick*, 36 Fed. 457; *Galliher v. Cadwell*, 145 U. S. 368; *Beckford v. Wade*, 17 Ves. Jr. 87; *Johnston v. Standard M. Co.*, 39 Fed. 304; *Godden v. Kimmell*, 99 U. S. 201; *Marsh v. Whitmore*, 21 Wall. 178; *Brown v. County of Buena Vista*, 95 U. S. 157.

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Where a party is entitled to rescind a contract on the ground of fraud, he must act promptly, with no vacillation, no unreasonable delay, no attempt to speculate upon his option. He must elect to rescind, and proceed as far as lies in his power to place himself and his purchaser *in statu quo*. *Kinne v. Webb*, 54 Fed. 34; *Thomas v. Bartow*, 48 N. Y. 193; *Flint v. Woodin*, 9 Hare, 622; *Floyd v. Brewster*, 4 Paige Ch. 537 (27 Am. Dec. 88); *Minturn v. Main*, 7 N. Y. 220; *Saratoga R. R. Co. v. Row*, 24 Wend. 74 (35 Am. Dec. 598); *Follansbe v. Kilbreth*, 17 Ill. 522 (65 Am. Dec. 691); *Jones v. Smith*, 33 Miss. 215; *Estes v. Reynolds*, 75 Mo. 563; *Johnston v. Standard Mining Co.*, 39 Fed. 304; *McLean v. Clapp*, 141 U. S. 429. One seeking to disaffirm a contract should do so at the earliest practicable moment and must return all that has been received under it. A retention of any portion is incompatible with the rescission of the contract. *Cobb v. Hatfield*, 46 N. Y. 533; *Voorhees v. Earl*, 2 Hill, 288 (38 Am. Dec. 588); *Curtiss v. Howell*, 39 N. Y. 211; *Dorr v. Fisher*, 1 Cush. 271; *Conner v. Henderson*, 15 Mass. 319 (8 Am. Dec. 103); *Kimball v. Cunningham*, 4 Mass. 502 (3 Am. Dec. 230); *Morse v. Brackett*, 98 Mass. 205; *Cook v. Gilman*, 34 N. H. 556; *Central Bank v. Pindar*, 46 Barb. 467; *Hinchman v. Kelley*, 54 Fed. 65; *Grymes v. Sanders*, 93 U. S. 62; *Shaeffer v. Sleade*, 7 Blackf. 184; *Ryneear v. Neilin*, 3 Greene (Iowa), 310; *Doughten v. Camden Bldg. Ass'n*, 7 Atl. 479.

The opinion of the court was delivered by

SCOTT, J.—The plaintiffs have appealed from a judgment of dismissal rendered upon an order sustaining a demurrer to their complaint. The complaint purports to contain two causes of action. It is alleged in the first cause of action that in 1840 Joseph

Sylva, then a resident of Philadelphia, died intestate on the high seas, leaving a widow, Sarah M. Sylva and their three minor children, two of whom are the plaintiffs; that he left an estate consisting of certain personal property which by the laws of the state of Pennsylvania descended one-third to the widow and the remainder to said children; that about 1842 said widow married one William Renton, and that she and Renton took possession of the estate of Sylva, realizing some \$5,000 in money; that with a part of this sum they purchased a sailing vessel in which they with the children went to California and took up their place of abode; that one of said children died in California, unmarried, and without issue, in 1857, and that her share of the property went, one-half to the mother and the other half to the plaintiffs. It is alleged that at the time of said marriage Renton had no property of his own, but that on removing to California he employed said vessel and the remainder of the proceeds of Sylva's estate in business of various kinds, by the profits of which he realized a large sum of money, with which he dealt in various properties, investing and reinvesting the same; by means of which he accumulated an estate exceeding three millions of dollars in value; that all of these properties became a trust fund to which the heirs of Sylva were entitled in their distributive shares, and that said Renton became a trustee for them, but never accounted to any of them, or paid over to any of them any of the trust estate; that in 1890 their mother, said Sarah M. Renton, died in this state intestate, then being the wife of said William Renton, and leaving as her sole surviving children, heirs and next of kin the plaintiffs; that in 1891 said William Renton died, having in his possession and under his control said estate,

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which he had attempted to dispose of by will to other parties; that an executor had been appointed who had taken possession of the estate.

In this cause of action the plaintiffs seek to have the entire estate adjudged to belong to them on the grounds of its being a trust estate now in the hands of the legal representative of said Renton. They claim that they first learned of their Pennsylvania estate and their rights therein in October, 1891, and they allege that Renton had concealed the facts from them; that he occupied the position of a parent to them from the time he was married to their mother, and took them into his house, they then being eight and four years of age; that he always treated them affectionately, maintained and educated them as if they were his children, and that they bore his name and lived with him as his children until they were married.

A number of objections are urged against this cause of action, one of which is that the plaintiffs' rights, if they ever had any, were barred by the lapse of time; that it fails to show sufficient reasons why the plaintiffs remained silent from the time they attained their majority until 1891, a period of over thirty years. The only answer to this is that Renton concealed the facts from them and represented that the property was his own.

We are of the opinion that the demurrer to this cause of action was well taken. The complaint fails to show how the plaintiffs obtained their information in 1891, and the bare allegation that they had no knowledge of the facts prior to that time is overcome by the other matters pleaded. It appears that at the beginning of the action they were fifty-nine and fifty-five years of age, and were women with husbands, and they do not

allege any want of capacity upon the part of themselves or their husbands to attend to or inform themselves of business matters of the character in question. There is no allegation that their mother had withheld from them their parentage or their family history, or that they were ignorant of it. The complaint simply rests upon the bare allegation in this particular, that they had no knowledge of the facts until October, 1891, and that Renton concealed the same from them and represented that the property was his. The plaintiffs having no legal claims upon said Renton and having already obtained over \$700,000 worth of property from his estate by virtue of a settlement, as appears in their complaint, when they come into a court of equity and seek from an investment of \$5,000 to obtain alleged accumulations amounting to millions, after the lapse of half a century, they must make a clear and explicit statement of all matters connected with their failure to assert their rights at an earlier date, including the source of their final knowledge as to their rights, when and how obtained, etc., in order to avoid a charge of laches. It does not appear that this information, which they acquired so shortly after the death of their mother and Renton, had not been open to them for years. No facts are alleged showing any fraudulent concealment by Renton. His saying that the property possessed by him was his may have been but the honest expression of his opinion only, and the circumstances would indicate that it was nothing more. Considering the parental care he had exercised over these plaintiffs, and the kind and generous manner in which he at all times treated them, it is certainly a most far-fetched claim that he intentionally, persistently and fraudulently, during all of said years, concealed from them the facts connected with

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their parentage, and that their real father had left this small amount of property, which he and their mother had taken possession of, and which the plaintiffs represent had grown into this colossal fortune to which they are entitled.

Conceding all that can be legitimately drawn from the allegations in this cause of action, in favor of the plaintiffs, it nevertheless is apparent, beyond all sensible controversy, that the claim is one of the stalest of the stale, and in all reason at this late day and time the plaintiffs should be barred from pressing it, there being no sufficient facts alleged to show any fraudulent concealment or dealing. We are aware that we have uniformly followed a liberal rule in construing pleadings as against demurrers; but the facts apparent from the complaint in this case should make an exception to that rule in considering the bare allegations of the deception by Renton and a want of knowledge on their part. Under all the circumstances shown, good pleading demands that they should allege sufficient facts, with particularity, showing such an exceptional case as would authorize them after all this lapse of time to successfully lay claim to this vast estate accumulated from so small a start. As was said in a somewhat similar case, *Felix v. Patrick*, 145 U. S. 317 (12 Sup. Ct. 867):

“The disproportion is so great that the conscience is startled, and the inquiry is at once suggested whether it can be possible that the defendant has been guilty of fraud so gross as to involve consequences so disastrous.”

If so, it is apparent that an exceptionally strong case must be made, and it is not made by the general allegations pleaded. *Hazard v. Griswold*, 21 Fed. 178; *Ambler v. Choteau*, 107 U. S. 586 (1 Sup. Ct. 556); *Kent*

v. Snyder, 30 Cal. 667; *Cole v. Joliet Opera House Co.*, 79 Ill. 96; *Brereton v. Hull*, 1 Denio, 75.

The second cause of action relates to the same property, and by it the plaintiffs seek to recover a portion of the estate only. Much that has been said in relation to the first cause of action, as well as the cases cited, bears with equal force upon this one also. We will not pass upon the question of the inconsistency of the two claims, but will consider the second cause pleaded independently of the other in this respect. In this it is alleged that the property was the community property of William and Sarah Renton, and that on the 24th day of February, 1888, they made a written contract for the purpose of regulating the disposition and status of a part of said property. The death of Sarah M. Renton is alleged, and that thereupon the plaintiffs became entitled to one-half of the property by descent from her, and that the other half of it belonged to William Renton. It is alleged that this contract provided for the appointment of a trustee of the community estate who should manage and control it in its entirety until January 1, 1900, and that shortly after the death of Sarah M. Renton said William Renton was, by the superior court of Kitsap County, that being the court of probate, appointed such trustee, and also administrator of the estate of his deceased wife, and that he qualified as such and filed an inventory of the property in that court, but that he claimed a large portion of the estate as his separate property; that an appraisal was had, the usual notice to creditors given, the debts of the estate paid, and the estate brought to a condition for partial distribution. That then he proposed to the plaintiffs that the trust created by the community property contract be abrogated and the property divided between himself and the plaintiffs,

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and that the plaintiffs and said Renton entered into a written stipulation or agreement accordingly, whereby plaintiffs agreed to take in full settlement certain real and personal property and release their claims to all the other property. This stipulation recites the community contract entered into by William and Sarah Renton aforesaid, the appointment of William Renton as said administrator after due notice, and that the plaintiffs were represented at the hearing; the filing of the inventory and appraisement, the payment of all the debts and the desirability of a decree of partial distribution, etc., and they thereupon applied to the court for a distribution and settlement of the property in accordance with the terms of said agreement; and on the 26th day of June, 1891, the court, upon the mutual application of the parties, entered a decree of distribution in accordance with said stipulation, and deeds were subsequently executed and delivered between the plaintiffs and William Renton in pursuance of such agreement, and the decree of the court. It is alleged that at that time William Renton knew the location, character and value of all this property, and knew all the facts in regard to its real ownership, and the rights of the parties to it, but that the plaintiffs had only a very slight knowledge of the property, of the origin of its title, and the facts determining its character and value, and had but scanty means of support for themselves and their families, and were dependent upon the honesty and fairness of Renton, and that they stood towards him as beneficiaries towards a trustee; that Renton claimed that the portion which he proposed the plaintiffs should take was of much greater value than its true value, and that the portion which he was to take was of far less value than its true value, and that the two were of equal

value; that Renton represented that all the property in his hands excepting that specially described in the community property contract was his separate property, whereas in fact, so far as it was not subject to the Sylva trust pleaded in their first cause of action, it was community property; that he threatened, unless they agreed to the compromise proposed by him, to resign as administrator, cause another to be appointed, throw the whole matter into court for a partition, and thereby cause great expense and delay, which the plaintiffs with their scanty means of support were not able to endure; that the plaintiffs were opposed to this division and tried to induce Renton not to insist upon it, but to pay over to them the income coming to them under the community property contract, all of which he refused to do; and finally, believing his false representations to be true in point of fact, and being coerced by his threats and at his mercy, they did sign the written agreement aforesaid on the 4th day of March, 1891; that the property so distributed by the court and settled upon William Renton in pursuance of such agreement was then and is now worth more than \$1,775,000, but that the property settled upon the plaintiffs by virtue thereof was not and is not in all worth more than \$725,000, and that at the time Renton refused to include in said estate a large amount of other property claiming that it was his separate property; that the plaintiffs had no interest in it, etc., and this additional property was and is now worth more than \$350,000; that the plaintiffs did not discover that the representations of William Renton as to the ownership and values of said property were false until after his death, and a few months before this suit was commenced, and that but for their ignorance of said matters and for Renton's representations, they would

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not have executed said written agreement nor made the deeds in pursuance of it; that the community property contract entered into between Renton and his wife affected Renton's share in the property of the partnership of Renton, Holmes and Company, of which firm Charles S. Holmes and William Renton were members, and that said Holmes was interested therein, and that he was not a party to the abrogation of the community property contract and did not consent to it, and without his consent that such agreement was without force. And furthermore that William Renton could not enter into said agreement with the plaintiffs by reason of his position as administrator of the estate of Sarah Renton, and as trustee under the community property contract, and of the plaintiffs' position as heirs of Sarah Renton and as beneficiaries under that contract; that upon discovering the true facts in the case, and that Renton's representations were false, the agreement had been disaffirmed and rescinded by the plaintiffs. The complaint also contained an offer to account for and restore the property received by them. The death of Renton was alleged and the appointment of an executor for his estate. Much more is contained in the complaint to which it is unnecessary to call attention.

But we are of the opinion that sufficient grounds to warrant a rescission of the written agreement entered into between the plaintiffs and Renton, and to authorize a cancellation of the deeds of conveyance thereafter executed in pursuance of it, have not been pleaded. While a want of knowledge of the value of the property is alleged, there is nothing to show that the plaintiffs did not have ample opportunity to inform themselves of its value and condition. It is conceded that their suspicions that Renton had

defrauded them were aroused in March, 1892. The action was not commenced until a year later. To excuse this it is claimed by them that it took them some months to ascertain the facts after they began an investigation. But it appears that they were parties to the probate proceedings from the beginning and were actively participating therein in July preceding the month of March when the stipulation was entered into. Inventories of the community property had been filed and the property appraised. This was a proceeding in court under oath, and the correctness of the inventory and appraisal is not attacked. In fact, the complaint fails to show what the appraised value was. The plaintiffs practically rest upon the bare assertion that Renton fraudulently misrepresented the values and ownership of the property, and that they relied upon his representations. There is enough in the complaint to show that the parties were in fact dealing at arms' length and that Renton had little or no vantage ground over the plaintiffs. According to the stipulation they were in a position to receive their property from the court on the basis of the probated community property contract. The indebtedness of the estate had been paid and their rights were judicially established. All things were ready to place them in the exact situation of their mother from whom they inherited this property. They saw fit not to stand upon this community agreement, but to make another and different arrangement for themselves.

Their claim that they were coerced into this agreement by Renton can hardly be regarded with seriousness. His threat was that he would resign and have another administrator appointed and leave the matter for the determination of the court. The only re-

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sult of this would have been to have substituted them to their mother's position,—the very relief they are now seeking. In fact, with Renton's resignation on file they would have had the additional right as sole heirs of their mother to have been appointed in his stead to conduct the further settlement of the estate. When Renton undertook by threats, as they allege, to coerce them into the compromise against their will, being women of mature years, not shown to be incapacitated from transacting business or so deficient in common knowledge as to be unable to attach the ordinary meaning to such conduct upon his part, that he was thereby seeking to obtain an advantage over them in the settlement, they should at once have been placed upon their guard and have informed themselves fully of the matters involved, if they were not already possessed of that information. They did not do this, nor did they proceed diligently upon the discovery of the alleged fraud. The stipulation was entered into in March, 1891; the decree was rendered thereon in June following. They discovered the alleged fraud in the settlement in March, 1892, but did not commence their action until one year or more later. Meanwhile, from time to time, they had been selling portions of the property obtained by them from Renton, both before his death and afterwards. They allege that these sales were made with the consent of Renton and with the consent of his executor after his death. It is apparent by this that their knowledge of the values of the property was such that they were willing to place that part of it received by them upon the market.

Furthermore, it appears in their first cause of action that they knew of the Sylva trust in October, 1891, and according to their contention therein they knew

that the property was all theirs, and that Renton had fraudulently concealed this from them and undertook to retain it as his own. The court cannot shut its eyes to this allegation of knowledge upon their part. Inconsistent allegations of fact of which the parties must have had personal knowledge must be construed against the pleader. If they knew that the property was all theirs under this Sylva trust, what mattered it, and how was any additional fraud practiced upon them by Renton's representing that a portion of the estate was his separate property? The allegation of a misrepresentation of the values of the property by him also is deprived of much of its force in the light of this prior allegation. Being possessed of all of this information they saw fit to enter into the contract of settlement, and from October, 1891, until April, 1893, after the death of Renton, when they commenced their action, they did little or nothing towards obtaining the cancellation of that settlement and the setting aside of the decree of the court thereon, and the deeds executed by them in pursuance of it. If, after entering into this agreement, they had a right to have it set aside on any ground, they should have proceeded promptly, without unreasonable delay, under the well settled rules of equity, and they did not do so. If they were possessed of the facts, as it seems to us they were, sufficiently to enable them to deal intelligently, they could attack the settlement only upon the ground of having been coerced into it by Renton. But there was as little basis for this claim of coercion as for the other, and there is no sufficient foundation for either cause of action.

The further claim that the agreement of settlement entered into between the plaintiffs and Renton was invalid because Holmes was not a party thereto is not

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Syllabus.

well founded. It does not appear that Holmes has ever questioned it, and it is apparent that at the time the agreement was entered into the plaintiffs knew Holmes' relations to the property in question. It is not claimed that they have any other or different information upon that subject now than was possessed by them at that time. With this knowledge they saw fit to enter into the agreement, and it was carried out without any interference by Holmes.

The judgment of the lower court is affirmed.

HOYT, C. J., and DUNBAR and GORDON, JJ., concur.

[No. 1849. Decided June 27, 1896]

JAMES HENRY EDMUNDS, *Appellant*, v. ALFRED L.
BLACK, *Respondent*.

PAYMENT — EVIDENCE — APPEAL — WAIVER OF OBJECTIONS.

In an action upon a judgment, defendant's plea of payment is established by evidence that plaintiff had received from defendant's father the plaintiff's own bond for a sum which he stated in a letter to defendant was bigger than the judgment and he thought they were square, as the only logical inference therefrom could be that the bond had been accepted in payment of the judgment. (HOYT, C. J., dissents.)

Error in giving an instruction will not be considered on appeal, when it appears that a number of special exceptions to the instructions were taken, stating the reasons and grounds thereof with particularity, but that the error urged in the appellate court had not been made a ground of exception in the court below.

Appeal from Superior Court, Whatcom County.—
HON. JOHN R. WINN, Judge. Affirmed.

Kerr & McCord, and *J. P. de Mattos*, for appellant.

Black & Leaming, and *Fairchild & Rawson*, for respondent.

OPINION ON RE-HEARING

SCOTT, J.—This case is before us on a petition for a rehearing. For the prior opinion see 13 Wash. 490 (43 Pac. 330), where we reversed the judgment rendered in the lower court on the ground that there was no proof upon which the jury could have found that the judgment sued on had been paid. Thereafter, being of the opinion that we had misunderstood the record in relation to such testimony, a rehearing was granted, and the cause has been re-argued, and we have come to the conclusion that we were wrong in reversing the cause, believing that there was sufficient evidence to sustain a finding that the judgment had been paid. This testimony is strung out through a number of pages of the record and so mixed up with objections and the argument of counsel that it was not fully understood at the time.

It appears that after obtaining the judgment the plaintiff wrote to defendant, who was then in this state, informing him of it and asking the defendant what he was going to do about it. Whereupon it appears that some further correspondence was had between the parties and that the defendant proposed to turn over certain real estate in satisfaction of it, although he did not fully testify in relation to this matter, owing to an objection interposed by the plaintiff's counsel, which was sustained by the court. Continuing his testimony, the defendant said: "In reply to that letter I got another letter. . . . In that letter Edmunds said he had received from my father this bond of \$1,500, the same, with interest, amounting to \$1,525 or \$1,530, which he stated was bigger than the judgment and he thought we were square."

It appears that this bond was the plaintiff's own

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Opinion on Re-hearing.

obligation and at the time he received it it amounted to a few dollars more than the judgment. In writing to the defendant about it he said as much and that he thought they were square. It seems to us that the only logical inference to be drawn from this testimony is that he had accepted the bond in payment of the judgment. It would have been a good counter claim against him if the defendant had held it, but here we find that the plaintiff's own obligation was turned over to him by the defendant's father for the defendant and received by the plaintiff, which at the time slightly exceeded the claim he held against the defendant, and the clear and legitimate conclusion to be drawn therefrom is that it could have been intended and accepted as nothing less than a payment, and, being more than the judgment, it fully paid it. Consequently the plaintiff had no right of action, and the jury were justified in finding for the defendant.

All other questions raised by the appellant were disposed of contrary to his contentions in the former opinion, with one exception, and that is over an instruction given by the court to the jury, wherein the court in referring to the judgment made use of the expression, "If you find this judgment is shown to exist," and it is contended that this was error, as it submitted the question of the existence of the judgment to the jury, whereas the defendant had expressly conceded that the judgment against him was established by the proofs. But it appears that the plaintiff took a number of special exceptions to the instructions, stating the reasons and grounds thereof with particularity and none was taken upon this ground, and, even if we were of the opinion that the plaintiff was prejudiced by this instruction, under such circumstances it could not be urged as error. The court

elsewhere in the instructions, however, substantially assumed that the judgment had been established and that the question of payment was the one for the jury to consider. Affirmed.

ANDERS, DUNBAR and GORDON, JJ., concur.

HOYT, C. J. (*dissenting*).—The existence of the judgment against the respondent having been conceded it was incumbent upon him to introduce testimony at least tending to show that it had been paid, and since that which he did introduce tended to show that, if paid at all, such payment had not been in money, it was necessary for him to show not only that property of value equal to the judgment had been received by the appellant, but also to show that at the time such property was received, it was taken by the appellant in full payment of the judgment, and in my opinion there was no testimony which tended at all to show that the property, which it was alleged had been received by the appellant, had been taken by him as payment of the judgment. On the contrary it affirmatively appeared that there had been nothing said or done by or between the parties at the time the property was delivered which tended to show that it had been accepted in payment of the judgment. I am, therefore, of the opinion that the respondent failed to introduce any evidence tending to show a fact which it was necessary for him to establish to overcome the *prima facie* case against him made by the introduction of the judgment in evidence.

[No. 2050. Decided June 27, 1896.]

PORT TOWNSEND SOUTHERN RAILROAD COMPANY, *Appellant*, v. A. R. COLEMAN *et al.*, *Respondents*.

EVIDENCE.

Where by the terms of a subsidy bond the obligee was given until September 1, 1890, to complete a certain amount of railroad line, in an action upon the bond after that date, evidence showing the condition of the road July 1, 1890, is inadmissible.

Appeal from Superior Court, Jefferson County.—
Hon. R. A. BALLINGER, Judge. Reversed.

S. H. Piles, and *J. E. Lilly*, for appellant.

The opinion of the court was delivered by

SCOTT, J.—This was an action upon a subsidy bond executed by the defendants to the plaintiff in the sum of \$1,000, conditioned that if the plaintiff should, on or before the 1st day of September, 1890, build, equip and operate a line of railroad twenty miles southerly from a certain point (in the city limits of Port Townsend), then one-fourth of the amount subscribed should immediately become due and payable, the balance to be paid on the 1st day of September, 1892, provided the road should be completed before that time to a connection with a transcontinental railroad. Judgment having gone against the plaintiff, this appeal was taken. No appearance has been made in this court by any of the defendants.

Upon the trial the court permitted testimony to be given as to the condition of the road on the 1st of July, 1890, to the effect that it had not at that time been completed in accordance with the conditions of the bond. This was error, for the plaintiff had until

the 1st day of September in which to complete the first twenty miles of road, and there was no proof to show that the road was in the same condition on the 1st of September as it was on the 1st of July, to which time such testimony related.

A number of other questions have been submitted by appellant over the instructions given by the court to the jury, but owing to the fact that there has been no appearance in this court by the defendants, and that we would be called upon to decide them on the argument of one side only, and to the further fact that the same questions may not again arise on a re-trial of the cause, as the testimony may be different, we will not consider them.

Reversed.

HOYT, C. J., and DUNBAR, ANDERS and GORDON, JJ., concur.

15	78
19	82
15	78
21	479

[No 2064. Decided June 27, 1896.]

MALCOLM McDOUGALL, *Appellant*, v. N. D. WALLING
et al., *Respondents*.

NEGOTIABLE INSTRUMENTS — EXTENDING TIME OF PAYMENT — FALSE
REPRESENTATIONS OF PRINCIPAL — RELEASE OF SURETY.

In an action upon a promissory note upon which a surety sets up the defense that payment had been extended for a valuable consideration without his consent, evidence of a representation by the principal maker to the holder, that the extension was asked at the instance and request of the surety, is admissible, though not made in the presence of the surety, because, if the representation were in fact false, the agreement to extend which was secured by means of the false statement would be invalid and ineffectual.

An agreement between a principal debtor and the holder of a note, to extend the time of payment for a definite period after maturity, in order to release the surety must be such an agreement as the principal debtor could himself enforce.

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Appeal from Superior Court, Snohomish County.—
Hon. JOHN C. DENNEY, Judge. Reversed.

Andrew F. Burleigh, and *Thomas A. Gamble*, for appellant.

H. D. Cooley, and *Francis H. Brownell*, for respondents.

The opinion of the court was delivered by

GORDON, J.—Appellant, McDougall, brought this action in the superior court of Snohomish county upon a promissory note executed by N. D. Walling and William G. Swalwell, payable to the order of Walling, dated April 24, 1893, and payable 90 days thereafter; said note being for the sum of \$2,800, and interest at the rate of 12 per cent. per annum from date until paid. The defendant Walling made default. Respondent Swalwell answered that he executed the note solely for the accommodation of Walling, and was a surety only, all of which was known to plaintiff at the time of the indorsement and delivery of said note to him by Walling; that, after the maturity of the note, appellant entered into a definite agreement with the defendant Walling, whereby the time of payment of said note was extended, and that the agreement to extend was made without the consent of the respondent, and released him from the payment thereof. The appellant replied, denying all of the affirmative matter set out in the answer, and, the cause having been tried before a jury, a verdict was returned in favor of Swalwell. Thereafter, appellant's motion for a new trial was denied, judgment entered dismissing the action as to Swalwell, and the cause appealed.

The undisputed testimony in the case shows that,

shortly after the execution of the note, Walling sold the same to the appellant, and that, prior to becoming the owner thereof, appellant had no conversation whatever with respondent Swalwell. At the time of its maturity, or within a few days thereafter, Walling requested an extension. It further appears that the sum of \$200 was paid by him at that time to the appellant, for the purpose, as testified by Walling, of paying the interest then due on the note, amounting to about \$75, and the balance as consideration for an extension of the note for a period of 30 days, or until August 24, 1893. The appellant, in his testimony, admitted the receipt from Walling of \$200 for the purpose of paying the interest then due upon the note, and the remainder as consideration for his agreeing to postpone suit on the note until August 24, 1893. He further testified that this arrangement was entered into upon the representation of Walling that he came with instructions from Swalwell to get the time extended; that he, Swalwell, was a banker at Everett; that "it was panicky times, and he could not draw the money . . . out of the bank. . . . He pleaded very hard for Mr. Swalwell's credit," and "I finally consented that I would not start an action for a certain length of time. . . . He stated most distinctly that he came down with Mr. Swalwell's sanction and consent." Counsel for the respondent Swalwell objected to the introduction of any testimony as to what Walling said to appellant, because not made in the presence of Swalwell, etc., and the lower court thereupon held that said statements were not competent as against Swalwell; adding: "I will allow him to state what was said there, but will cover it with instructions to the jury after-

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wards;" and thereafter the court charged the jury in respect thereto as follows:

"You are further instructed that when it is sought to bind the defendant by statements made by a third party, not in the presence of the defendant sought to be charged, it must be shown, not only that such statements were so made, but it must be further shown that such third party was authorized to make such statements by the party sought to be charged."

To this ruling, and the giving of the instruction set out, appellant excepted, and has assigned the same as error.

We think that the testimony was competent, and should have been permitted to go to the jury. An agreement between a principal debtor and the holder of a note, to extend the time of payment for a definite period after maturity, in order to release the surety, must be such an agreement as the principal debtor could himself enforce. The representation by Walling (assuming that it was made) that Swalwell requested and consented to the extension which was sought became material, because assuming that Swalwell was a surety merely, the representation, if false in fact, was fraudulent, and the agreement to extend, which was secured by means of the false statement, was invalid and ineffectual. Walling could not have enforced it, because of the fraudulent means employed in obtaining it. If, on the other hand, the representation was made by Walling upon authority from Swalwell, or if Swalwell subsequently consented to the extension so obtained, he would not be released, assuming that he was a surety only, and that appellant had knowledge of that fact.

The question here presented was involved in *Bangs v. Strong*, 10 Paige, 11. It was there held that where

an "agreement is obtained from the creditor by a principal debtor upon the false representation of the latter that the surety had authorized him to make it, and the surety afterwards refuses to assent to the agreement, the creditor will be at liberty to repudiate it."

It is further insisted by appellant that the evidence was insufficient to justify the verdict. We think, however, that, upon the material issues, the testimony was sufficiently conflicting to require its submission to the jury under proper instructions. As the cause must be retried, however, we deem it proper to say that instructions Nos. 8 and 9, which were excepted to by appellant, should not, in our opinion, have been given. They are incomplete, and, in a measure inconsistent with instructions 1-3, given by the court, which correctly stated the law. Whether the giving of these instructions constituted such error as would require a reversal of the cause, we are not called upon to determine.

As a new trial must be had, we think that, in order to fully determine the rights of parties, special findings should be required of the jury, as provided in § 375, Code Proc.; and, if the jury find that respondent Swalwell was merely surety for Walling, and that appellant knew of that fact at or prior to the time of the purported extension, then they should be required to find whether such extension was secured wholly or in part by means of Walling's falsely representing that Swalwell consented thereto; and, if the jury shall find that such representations were made, then the appellant would be entitled to recover the amount of the note with interest from July 23, 1893, less the sum of \$125, withheld as bonus or consideration for the extension granted, which last mentioned sum it

would be the right of the respondent to have treated as a partial payment upon the note.

Reversed and remanded.

SCOTT, DUNBAR and ANDERS, JJ., concur.

HOYT, C. J., concurs in the result.

[No 2170. Decided June 29, 1896.]

CHESTER THORNE *et al.*, *Appellants*, v. RUSSELL T. JOY, *Defendant*, CLARK W. SPRAGUE *et al.*, *Respondents*.

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18	419
15	83
22	476
15	83
24	682
15	83
40	3

TRIAL BY COURT—SUFFICIENCY OF FINDINGS—WITNESSES—TRANSACTIONS WITH DECEDENTS—REOPENING CASE—EVIDENCE—PROOF AFFECTING WRITTEN INSTRUMENTS.

The fact that findings of fact made by the court are obscure, indefinite and uncertain, and do not set out the specific facts established by the proofs, cannot be urged as error, when the decree based thereon is one dismissing the action for the reason that plaintiffs had failed to make out a case.

The rule excluding the testimony of an interested party in an action against the executor of a deceased person, will apply to one who has conveyed away his interest in the land which is the subject matter of the action by a deed absolute on its face but in reality only a mortgage, even though, for the purpose of rendering his testimony competent, he execute a release of his right to redeem.

Agreements and arrangements entered into with a deceased person cannot be given in evidence in an action against his executor by parties whose interests are adverse, even if competent as to another defendant in the action, when the relief sought against such other defendant is incidental to the principal object sought by the action against such executor, and when the court has not been sufficiently advised as to the restrictive purpose for which the evidence was offered.

It is within the discretion of the trial court to reopen the case for the introduction of additional testimony.

Where the object of an action is to affect a written instrument, only clear and satisfactory proof will justify a decree in favor of the plaintiffs.

Appeal from Superior Court, Pierce County.—Hon. W. H. PRITCHARD, Judge. Affirmed.

Bogle & Richardson, for appellants.

Stiles & Stevens, for respondents.

The opinion of the court was delivered by

HOYT, C. J.—The object of this action was to have a certain mortgage which had been executed by the Tacoma Passenger and Baggage Transfer Company to secure an indebtedness of \$18,000 to John W. Sprague, and which covered the real estate described in the pleadings, canceled by the executors of said Sprague, so far as it was a lien upon the interest of the plaintiffs in said real estate. It was also sought to have an accounting between the plaintiffs and defendant Clark W. Sprague, and a decree against him for such balance as might be found due plaintiffs on said accounting. Isaac W. Anderson was originally one of the plaintiffs, but upon proof that he had parted with all interest in the property by a conveyance to the National Bank of Commerce, the complaint was by order of the court amended by making such bank a co-plaintiff in lieu of said Anderson, and the case was dismissed as to him. The answer of Clark W. Sprague and that of the executors of the last will and testament of John W. Sprague put in issue the material allegations of the complaint.

Upon the trial of the issues thus made the court was of the opinion that the plaintiffs had failed to make out a case, and entered a decree dismissing the action. Before doing so it made certain findings of fact and conclusions of law, to which exceptions were duly taken by the plaintiffs, and the first alleged error relied upon for reversal is the insufficiency of these

June, 1896.] Opinion of the Court — HOYT, C. J.

findings of fact and conclusions of law; the claim being that said findings are obscure, uncertain and indefinite and do not set out the specific facts found to be established by the proofs. If the findings were to have been the basis of an affirmative decree they might have been insufficient, but a general finding to the effect that plaintiffs have failed to make out a case is sufficient foundation for a decree dismissing the action. Such a decree is warranted upon a failure to find by the court, and it is not necessarily founded upon any affirmative finding by it. If any findings at all were necessary in the case at bar those which were made were, in view of the decree that was entered thereon, amply sufficient.

The next complaint of appellants is that the court erroneously struck out the testimony of Isaac W. Anderson relating to transactions with John W. Sprague, whose executors were parties defendant in the action. Some criticism is made by appellants upon the form of the respondents' objection to the evidence of said Anderson, but in view of all the circumstances we think the mind of the court was sufficiently directed to the fact that their objection was founded upon the claim that he was incompetent to testify against the representatives of said John W. Sprague by reason of our statute relating to the competency of witnesses to testify as to transactions with the deceased person in an action to which his representatives are parties. It is further claimed that said Anderson was a competent witness by reason of the fact that he was not a party to the action, it having been dismissed as to him, and that he was not interested in the result thereof adversely to the representatives of said John W. Sprague. Elaborate argument

has been presented upon the subject of the competency of witnesses under statutes similar to ours, but the conclusion to which we have come as to the facts disclosed by the record makes it unnecessary for us to enter into any lengthy discussion of the questions presented in this argument. In our opinion, the undisputed proof showed that said Anderson was at the time of the trial interested in the result of the action adversely to the representatives of said Sprague. The circumstances surrounding the conveyance of his interest in the land covered by the mortgage were such that he had a right to redeem it upon payment of the amount due to his grantee, with interest thereon; and such being the fact, his conveyance under well settled rules amounted to no more than a mortgage, notwithstanding it was in the form of an absolute deed. For while it is no doubt true that a deed can be made to take effect as such even although there is a contemporaneous agreement for a reconveyance upon certain conditions, yet the general rule is that where a deed is made for the purpose of securing a debt, and is accompanied by a contemporaneous agreement that upon the payment of said debt and interest the property will be reconveyed, such deed is in legal effect only a mortgage; and there was nothing disclosed by the proofs which took the transaction under consideration out of such general rule. It follows that the court properly struck the testimony of said Isaac W. Anderson from the record, unless his release of his right to redeem made him a competent witness, and, under the circumstances, we think it did not.

The next alleged error is that the testimony of Thorne and Baker as to agreements and arrange-

ments entered into in November, 1891, when all the stockholders, including said John W. Sprague, were present, was improperly excluded; but in our opinion such testimony came directly within the provisions of our statute and was clearly incompetent when offered for the purpose of establishing a liability on the part of the representatives of said John W. Sprague. Nor was the exclusion of this testimony erroneous for the reason that it was competent against Clark W. Sprague and tended to prove the case alleged in the complaint against him. First, for the reason that the court was not sufficiently advised as to the restricted purpose for which it was offered; and second, the relief sought against Clark W. Sprague was incidental to the principal object sought by the action against the executors of the last will and testament of John W. Sprague.

The fourth error assigned grows out of the action of the court in re-opening the case after the trial had been closed and findings had been proposed, for the purpose of permitting respondents to introduce the Sprague mortgage. But, in our opinion, this action of the court was but a proper exercise of its discretion. Beside, it is difficult to see how the appellants were so affected by such action, even if erroneous, that they would be entitled to a reversal on account thereof.

There is a general claim on the part of the appellants that even without the testimony of Anderson there was sufficient proof to authorize such findings of fact in their favor that a decree in accordance with the prayer of the complaint could have been properly founded thereon. But after an examination of the record, we are satisfied with the conclusions reached by the trial court. The object of the action being to affect a written instrument, only clear and satisfactory proof would justify a decree in favor of the plaintiffs,

and the competent evidence introduced did not furnish such clear and satisfactory proof.

The judgment and decree will be affirmed.

SCOTT, DUNBAR, ANDERS and GORDON, JJ., concur.

15	88
17	59

[No. 2234. Decided June 29, 1896.]

S. T. PACKWOOD, *Appellant*, v. COUNTY OF KITTITAS *et al.*, *Respondents*.

COUNTY INDEBTEDNESS — VALIDATING ELECTION — NOTICE — BONDS —
PAYMENT IN GOLD.

A notice of election for the purpose of validating county warrants, given under the provisions of Laws 1893, p. 181, need not specify the polling places in the county where the election is to be held, but is sufficient when it gives a general notice as to when the election would be held throughout the county, since the general election law requiring notices to be posted in the several precincts affords the voters opportunity to ascertain where in each precinct the election would be held.

When legislative authority is given to a county to issue funding bonds, without any restriction as to the kind of money in which they shall be payable, the county has discretion to issue such bonds as will best accomplish the general object to secure which their issue was authorized.

When authority is conferred upon a county to issue bonds, the county is authorized to make them payable in gold, when there is no legislative restriction thereon, especially in view of the circumstance that it had been customary in this state and territory, prior to the grant of legislative authority, to make such bonds payable in gold, as it must be presumed it was the intention of the legislature that the former custom should be followed.

Appeal from Superior Court, Kittitas County.—
Hon. CARROLL B. GRAVES, Judge. Affirmed.

Wood & Oakley, for appellant.

Eugene E. Wager, for respondents.

June, 1896.] Opinion of the Court—Horr, C. J.

The opinion of the court was delivered by

Horr, C. J.—By this action it was sought to prevent the county of Kittitas from issuing certain proposed funding bonds, and to restrain the officers of said county, who were made defendants, from signing, attesting or countersigning said bonds. The grounds upon which these objects were sought were the alleged invalidity of the act of March 9, 1893 (Laws, p. 181), under which there had been an attempt to validate the warrants for which the funding bonds were to be issued, the invalidity of the act of March 22, 1895 (Laws, p. 465), which authorized the issuing of funding bonds, and the insufficiency of the election held for the purpose of validating the warrants, even if the act under which it was held was valid. The validity of the first of these acts was recognized by this court in the case of *Hunt v. Fawcett*, 8 Wash. 396 (36 Pac. 318), and in *Williams v. Shoudy*, 12 Wash. 363 (41 Pac. 169), the objections to the other are not clearly pointed out and we see no reason for holding that it is not in full force.

The regularity of the election proceedings for the validation of the same warrants which are involved in this action was also passed upon in the case of *Williams v. Shoudy*, *supra*, and a conclusion reached adverse to the contention of appellant, but the particular ground upon which the appellant in this action principally relies was given but slight consideration. The main contention of appellant in the case at bar is that the election proceedings were invalid for the reason that no sufficient notice was given of such election. The alleged insufficiency of the notice consists in the fact that it was not stated therein at what place or places the election would be held, the only statement as to time and place being that on the 8th

day of November, 1894, in the county of Kittitas, state of Washington, such election would be held, and it is claimed the failure to state in the published notice the places at which the election would be held rendered the notice insufficient. But we are of the opinion that the law did not contemplate that more than a general notice as to when the election would be held throughout the county should be published; that it was intended that voters should resort to the notices required by the general election law to be posted in the several precincts to ascertain where in each precinct the election would be held. We see no reason to doubt the correctness of the decision in the case above referred to, to the effect that this election was sufficient for the purposes for which it was held.

One other fact was alleged which it was claimed would make the proposed issue of bonds illegal. It was that under the terms of the contract with the firm to whom the bonds were to be sold they were to be made payable in gold coin, and it is claimed that without express authority from the legislature the county officers could not legally make such bonds so payable. But, in our opinion, such authority may be implied from the legislation upon the subject, though not conferred in express terms. When the legislature grants to a municipality the right to issue bonds it necessarily leaves to such municipality much discretion as to the conditions of such bonds, and excepting as it is restricted by the terms of the act granting the authority such municipality has discretion to issue such bonds as will best accomplish the general object to secure which their issue was authorized; and since such bonds must be payable in some kind of money, in the absence of express restriction it is for the municipality to determine as to the kind of money.

June, 1896.] Opining of the Court — Hoyt, C. J.

Beside, the legislation of this state, when interpreted in the light of surrounding circumstances, may well be held to have conferred express authority to issue bonds payable in gold. All legislation should be interpreted in the light of surrounding circumstances, and it was a well-known fact at the time the legislation in question was enacted, which must be presumed to have been known to the legislature, that the bonds which had theretofore been issued by the municipalities of this state and territory were mostly, if not all, made payable in gold coin. Hence, when authority was given for a further issue of such bonds, without any restriction as to the kind of money in which they should be made payable, it may well be presumed that it was the intention of the legislature that the former custom should be followed and the bonds made payable in gold.

This question was before the circuit court for the district of Washington in the case of *Moore v. City of Walla Walla*, 60 Fed. 961, and it was there decided that municipalities of this state were authorized to issue gold bonds. To the same effect is *Farson, Leach & Co. v. Board of Commissioners of Sinking Fund (Ky)*. 30 S. W. 17.

No error is disclosed by the record which can avail appellant and the judgment of the superior court will be affirmed.

ANDERS, DUNBAR and GORDON, JJ., concur.

[No. 2237. Decided June 29, 1896.]

M. M. TAYLOR, *Appellant*, v. CITY COUNCIL OF TACOMA
et al., *Respondents*.

OFFICERS — REMOVAL FOR MISCONDUCT — APPEAL.

The supreme court will not review the evidence in a special proceeding instituted under the provisions of Laws 1895, ch. 65, p. 114, unless settled in a statement of facts or bill of exceptions, and certified by the judge of the trial court, in accordance with Laws 1893, p. 115, § 11, as containing all the material facts.

Appeal from Superior Court, Pierce County.—Hon. W. H. PRITCHARD, Judge. Affirmed.

Francis W. Cushman, Edward E. Cushman, and Charles Ethelbert Claypool, for appellant.

John Paul Judson, and W. H. H. Kean (Stacy W. Gibbs, of counsel), for respondent.

The opinion of the court was delivered by

GORDON, J.—This was a special proceeding instituted under chapter 65, Laws 1895 (p. 114) in the superior court of Pierce county, for the purpose of reviewing the proceedings taken by the city council of the city of Tacoma in removing the appellant from his position as a member of the Board of Public Works of said city, said proceedings for removal having been based upon the formal charges filed with said council in accordance with the provision contained in its freeholders' charter.

Upon the hearing in the lower court, it was stipulated by counsel for the respective parties that a purported transcript of the testimony and exhibits taken and received upon the trial before the council, (which transcript the appellant had prepared and attached to

June, 1896.] Opinion of the Court — GORDON, J.

the stipulation), contained "all of the material evidence and testimony that was offered both by the prosecution and defense in the trial of M. M. Taylor before the city council of Tacoma . . . not; however, waiving any right on the part of the defendant to object to the filing of the same or consideration thereof by the court of review."

This purported transcript of the evidence taken before the council is brought to this court pursuant to the following order of the superior court, viz.:

"Now on this 4th day of March, 1896, it appearing to the court that the above named plaintiff has appealed this said cause to the supreme court of the state of Washington, and that the transcript of testimony on file herein will be material for the review of said cause on appeal, it is hereby ordered that the original transcript of said testimony on file in this superior court may be used as a part of said record on appeal and transmitted to the said supreme court.

W. H. PRITCHARD, Judge."

A motion has been made to strike the statement of facts herein for the reason, among others, that "There is no certificate of the trial judge as to their authenticity or correctness," and we think the motion must prevail.

Counsel for the appellant in opposition to the motion, insist that—

"There is no provision in the act of 1895 . . . requiring that the bill of exceptions should be certified to by any one, though there is no doubt that it should be regulated by statute or rule of court, but it has not been done."

We are unable to agree with this insistent. Section 34 of chapter 65, *supra*, is as follows:

"Except as otherwise provided in this act, the provisions of the Code of Procedure concerning civil

actions are applicable to and constitute the rules of practice in the proceedings in this act."

We see no reason why the bill of exceptions or statement of facts in this case could not have been settled as provided by §§ 8, 9 and 11 of the act of March 8, 1893 (Laws 1893, p. 114), and we think that the procedure there provided for should have been followed. The order of the judge above set out does not meet the requirements of the certificate provided for by § 11 of the act of 1893, *supra*, and we are unable to say from this record that the so-called "transcript" of the evidence received before the council contains "all the material facts" upon which a trial or a hearing of this cause proceeded in the lower court.

We think that the charges upon which the appellant was tried and removed from office by the council of said city were sufficient to give that body jurisdiction, and it follows that the judgment appealed from must be affirmed.

HOYT, C. J., and DUNBAR, ANDERS and SCOTT, JJ., concur.

[No 2156. Decided June 30, 1896.]

EDWARD P. FOURNIE, *Respondent*, v. B. P. SHEPARD,
Defendant, N. W. BUSH, *Appellant*.

TRUSTS — CREATION AND EXTINGUISHMENT.

Where a voluntary association has been formed, known as the Fishermen's Union, for the purpose of maintaining the price of fish, which were to be sold through a committee, moneys advanced for the fish by a purchaser do not become the joint property of the

June, 1896.] Opinion of the Court — Hoyt, C. J.

members of the union to be held in trust for distribution among them.

Where money of an association, held in trust by one member thereof, has been paid out to another party, its trust character is, in the absence of fraud, thereby lost, and cannot be enforced as against such third party.

Appeal from Superior Court, Chehalis County.—
Hon. MASON IRWIN, Judge. Reversed.

Bush & Coons, for appellant.

William O. McKinlay, for respondent.

The opinion of the court was delivered by

HOYT, C. J.—Many reasons are set forth in the appellant's brief for the reversal of the judgment entered in this action. Some are founded upon the rulings of the court upon questions raised on the allegations of plaintiff's complaint, and some upon questions which arose during the trial of the cause; but the conclusion to which we have come as to the merits of the plaintiff's claim, as made to appear from the whole record, makes it unnecessary for us to enter into details.

Plaintiff in behalf of himself and numerous other parties sought to assert rights to certain moneys which it was alleged were held by the defendants in trust for them, and the only reason why it was claimed that their joint interest in the money could be asserted in a single action brought by the plaintiff for their benefit was that they were all members of what was known as the "Fishermen's Union." But it was nowhere alleged that such Fishermen's Union was a corporation or a copartnership, or that it had any legal existence whatever. On the contrary, facts were made to appear, both from the pleadings and

proofs, which clearly showed that such union was a purely voluntary association, having no legal status whatever. It is true there was testimony tending to show that they had combined for the purpose of maintaining the price of fish, and that a committee appointed for that purpose had agreed to dispose of all the fish which the several members of the union might catch; but, in the absence of some binding organization known to the law, no member of the union could have been legally bound by the agreement so entered into. There might have been a moral obligation on the part of the several members of the union to abide by the arrangement between them, and on the part of the body collectively to adhere to the agreement entered into in behalf of the union by the committee; but, unfortunately for the claim of the plaintiff, the law has not yet reached that advanced stage where every moral obligation creates a legal liability.

There was no joint contractual relation shown to exist between the one to whom the fish were sold and delivered and the members of the Fishermen's Union. The only legal obligation which was assumed by the one who so purchased the fish was to pay the owner for them either the agreed price or what they were reasonably worth, and there was no joint owner of the whole of the fish furnished by all of the members of the union. Either the fish became the property of the committee, and they liable to each of the fishermen for what they had furnished, or those furnished by each fisherman remained his property until delivered by the committee to the person to whom they were sold. In one case he would derive title from the committee and be liable to it or its members for all of the fish; in the other to each fisherman for the fish fur-

June, 1896.] Opinion of the Court — HORT, C. J.

nished by him. In either case the transaction created no liability on his part to the Fishermen's Union for all or any part of the fish. Hence, none of the money advanced, or to be advanced for the purchase of the fish became the joint property of the members of the Union to be held in trust or otherwise by any person whatever.

It follows that the trust which was sought to be enforced as to the money alleged to have been in the hands of the defendants did not, and from the nature of the transaction could not, have existed. Beside, the undisputed proofs showed that as between Johnson and Shepard, Shepard represented the Fishermen's Union, and, if he held this money in trust at all, held it adversely to Johnson and for the Fishermen's Union, hence in any settlement which he made with Johnson, he would represent such Union and it would be bound by his action unless there was a combination shown between him and Johnson to defraud the Union. This being so, the settlement which was shown to have been had between Shepard and Johnson by himself or through the agency of N. W. Bush was, in the absence of fraud, binding not only upon Shepard but upon the Fishermen's Union which he represented, and the money which through such settlement was obtained by Johnson or by Bush as his agent would thereafter be held adversely not only to Shepard but also to the Fishermen's Union, and as there was an express finding by the court at the close of plaintiff's case that no fraud had been shown, it follows that even if this money had been so held by Shepard in trust for the Fishermen's Union that such trust could have been enforced in the courts against him, the trust character of the funds was lost when

without fraud they were paid by Shepard to Johnson or to Bush as his agent. The undisputed proof showed that Shepard was acting for the Fishermen's Union as its agent, that Johnson made claim to the money in his hands, and that such claim was adverse to the claim of such Union. Its adjustment without fraud would take from any funds, which might by virtue of such adjustment have been paid to Johnson, their trust character, and Johnson would hold them adversely to Shepard and to the Union which he represented.

For either one of the reasons above set out the undisputed proofs showed that the defendant N. W. Bush did not hold any funds which had come into his hands in trust for the plaintiff or his associates. The judgment will be reversed as to the appellant and the cause remanded with instructions to dismiss the action as to him. Appellant will recover his costs in both courts.

DUNBAR, ANDERS, SCOTT and GORDON, JJ., concur.

[No 2213. Decided July 2, 1896.]

THE STATE OF WASHINGTON, *Respondent*, v. W. C. MURPHY, *Appellant*.

CRIMINAL LAW — EVIDENCE — BELIEF OF WITNESS — WEIGHT OF TESTIMONY.

In a prosecution for cattle stealing it is competent for a witness, in testifying as to the identity of the animal alleged to have been stolen, to state that it was such animal "to the best of his judgment and belief," as the question of the force to be given to his testimony is for the jury.

Although the evidence in a criminal case may not have been of the most satisfactory and convincing kind, yet the verdict of the jury should not be disturbed on appeal, if there was evidence tend-

15	98
22	621
15	98
20	695
31	93
15	98
32	185

July, 1896.] Opinion of the Court—HOYT, C. J.

ing to establish every material fact necessary to show the guilt of the defendant. (*State v. Kroenert*, 13 Wash. 644, followed.)

Appeal from Superior Court, Whitman County.—
Hon. E. H. SULLIVAN, Judge. Affirmed.

S. J. Chadwick (*Fullerton & Wyman*, of counsel),
for appellant.

H. W. Canfield, Prosecuting Attorney, for The State.

The opinion of the court was delivered by

HOYT, C. J.—Appellant was convicted of the crime of cattle stealing, and by this appeal seeks to reverse the sentence imposed upon such conviction. The first alleged error grows out of the action of the court in admitting certain evidence offered by the plaintiff over his objection, and in denying his motion to strike certain other evidence introduced by the plaintiff.

The ground upon which it is alleged that the evidence was incompetent was that the witness in testifying as to the identity of the animal which it was alleged had been stolen, stated that it was such animal "to the best of his judgment and belief," instead of stating that he knew such to be the fact. But, in our opinion, it was entirely competent for the witness to testify that he believed it was the animal, even although he was not willing to state that such belief amounted to positive knowledge. The force to be given to his testimony might be influenced by the form in which the alleged fact was stated, but the weight to which the testimony was entitled was for the jury and was not a question of law to be decided by the court. One witness might be careful to refrain from testifying to positive knowledge, even though he had a belief so strong that another differ-

ently constituted would, under the same conditions, be entirely willing to testify that the fact was within his knowledge. As a matter of strict construction, all any witness can testify to is his belief as to the existence of a fact. Such belief may, in one case, be so strong that it amounts substantially to positive knowledge. In another it may be less convincing. But, in any case, it is competent for a witness to testify that he believes a certain statement to be true, and the question of the force to be given to his testimony is for the jury.

The only other ground upon which it is claimed that the judgment and sentence should be reversed is that the evidence was not sufficient to sustain the verdict. A careful examination of the evidence discloses the fact that it was not of the most satisfactory and convincing kind, but it also discloses the fact that there was evidence tending to establish every material fact necessary to show the guilt of the defendant, and, this being so, we are of the opinion that it is our duty not to disturb the verdict of the jury rendered thereon. Such verdict was rendered after the jury had seen the witnesses upon the stand and heard their testimony, and they were better qualified to pass upon the question of fact as to whether or not the evidence was sufficient than we are from an examination of the evidence offered, unaided by a personal inspection of the witnesses and of their manner in the giving of the testimony. Not only did the jury after having heard the testimony decide that it was sufficient to establish the guilt of the defendant, but the trial court, who also had the advantage of seeing the witnesses and noting the manner in which they testified, was satisfied that the evidence warranted the verdict which was returned; otherwise it would have granted the motion

July, 1896.]

Argument of Counsel.

for a new trial. Under the rule announced in *State v. Kroenert*, 13 Wash. 664 (43 Pac. 876), the evidence was sufficient to make it our duty to allow the verdict to stand.

The judgment and sentence will be affirmed.

ANDERS, DUNBAR, GORDON and SCOTT, JJ., concur.

[No 2148. Decided July 6, 1896.]

MARTIN BJMERLAND *et al.*, Respondents, v. AMY ELEY
et al., Appellants.

DEED—DELIVERY—EFFECT OF RECORD BY GRANTOR—INTEREST OF
MINOR HEIRS IN COMMUNITY ESTATE—SALE WITHOUT ORDER OF
COURT.

A sale by a father of his minor children's portion of a community estate inherited from their deceased mother, when not made under order of the probate court, cannot, in an action against the children by the grantees to quiet title, be treated as having been made for the benefit of the heirs and as subject to confirmation in such action, on the theory of necessity for such sale, even though the grantees had in good faith purchased and improved the property, as the children would not be estopped by any dishonest conduct on the part of their father in making the sale.

The recording of a deed by the grantor is a sufficient delivery to convey title where the conveyance is for the benefit of an infant, as in such case the infant will be presumed to have accepted it.

The presumption that the recording of a deed to an infant by the grantor is evidence of his intention to convey, can be overcome only by the strongest kind of proof that the grantor's intention in making the conveyance was to defraud existing creditors; the fact that, subsequent to the conveyance, the grantor enters into dishonest schemes to defraud others by another sale of the same land not being sufficient to affect the validity of the prior deed to the infant.

Appeal from Superior Court, Kitsap County.—Hon.
JOHN C. DENNEY, Judge. Reversed.

William Martin, for appellants:

It is a well established rule that, where a deed is

given for the benefit of an infant, delivery to such infant is not not necessary; but even if such delivery should be held to be necessary in such cases, then the delivery of the deed to the auditor of Kitsap county for the purpose of having the same recorded, was a sufficient delivery to appellants. *Mitchell's Lessee v. Ryan*, 3 Ohio St. 377; *Cecil v. Beaver*, 28 Iowa, 241 (4 Am. Rep. 174); *Standiford v. Standiford*, 97 Mo. 231; *Baker v. Haskell*, 47 N. H. 479 (93 Am. Dec. 455); *Glaze v. Three Rivers, etc., Ins. Co.*, 87 Mich. 349; *Walker v. Walker*, 89 Am. Dec. 445; *Davis v. Garrett*, 18 S. W. 113; *Gregory v. Walker*, 38 Ala. 26; *Spencer v. Carr*, 45 N. Y. 406 (6 Am. Rep. 112). When the grantee in a deed is an infant the law presumes assent on his part to a beneficial conveyance, and knowledge thereof and of its delivery are not essential. *Sneathen v. Sneathen*, 24 Am. St. Rep. 326; *Halluck v. Bush*, 1 Am. Dec. 60; *Treadwell v. Bulkley*, 4 Am. Dec. 225; *Merrills v. Swift*, 46 Am. Dec. 315; *Blight v. Schenck*, 51 Am. Dec. 478.

John F. Dore, and *Daniel T. Cross*, for respondents.

The opinion of the court was delivered by

DUNBAR, J.—The land in dispute was the community property of Henry Eley and Lucy Eley. After the death of Lucy Eley it was conveyed to the children of Henry Eley, viz., Amy Eley and John Eley, by their father. This deed was executed on the 13th day of January, 1883, with the express consideration of the love and affection the father had for the children, the appellants in this case. The deed was a quitclaim deed and was recorded in the office of the auditor of Kitsap county on the 13th day of January, 1883.

On the 4th day of the subsequent December Henry

July, 1896.] Opinion of the Court — DUNBAR, J.

Eley conveyed the same land by warranty deed to Henry Nesbitt and James J. Hallan. This deed was duly recorded and Nesbitt and Hallan subsequently conveyed the property by warranty deed to the respondents. The respondents took possession of the land several years ago, and according to the testimony have placed upon it about \$5,000 worth of improvements. Shortly after the discovery by the respondents of the fact that the deed had been executed by Henry Eley to the appellants this action was brought to quiet the respondents' title, and to enjoin appellants from asserting any claim whatever to said land, adversely to the respondents' interests. A demurrer was interposed to the complaint to the effect that it did not state facts sufficient to constitute a cause of action, which demurrer was overruled. The appellants answered, and a trial was had which resulted in the court's decreeing to the respondents the relief prayed for. From this judgment an appeal is taken to this court. It is doubtful if the complaint in this action states facts sufficient to constitute a cause of action, the principal allegation being that the appellants, Amy and John Eley, are minors and children of Henry Eley, and that Henry Eley on the 13th day of January, 1883, in said Kitsap county, attempted to convey the property hereinbefore described without consideration to said Amy and said John Eley, for the purpose of defrauding his, said Henry Eley's, creditors, and that there has not been any delivery of the said deed from said Henry Eley to the said Amy and John Eley. But, however this may be, upon the trial of the cause there was no attempt to introduce any testimony showing that Henry Eley had any creditors at the time of the execution of the deed, while the testimony shows conclusively, and in fact it is con-

ceded, that the deed from Henry Eley to his children, the appellants here, was on record at the time of, and prior to, the purchase of the land by Hallan and Nesbitt, and at the time of the execution of the deed to them.

There are two principal contentions here by the respondents. One is that placing a deed on record does not work a delivery of the same, and the other is that under the testimony in this case it should be held that the sale to Hallan and Nesbitt was for the benefit of the heirs of the estate, and that that sale should now in effect be confirmed by this court, although it was not made by order of the probate court. But however desirable it might be to make such a ruling in this particular case, where it unquestionably appears that the grantor, Henry Eley, has acted dishonestly, and, in fact, seems to have no comprehension of fair dealing, yet it will not do to lay down and establish a wrong principle of law to meet and obviate the hardships of a particular case, for Henry Eley is not a party to this case; the action is brought against the minors, and they cannot be estopped by any dishonest conduct or actions on the part of their father. The law at that time gave original jurisdiction of the sale of real estate for the benefit of the heirs to the probate court, and now does to the superior court. The advisability of selling this land was never before the probate court, no showing was made at the time that it was necessary to sell the same either to pay the debts of the estate, or for the maintenance of the minor heirs, and it would be a dangerous precedent to establish to allow the estates of minors to be sold in this way without any order of the court and many years afterwards to have the sale confirmed, when the testimony must of necessity be more meager and when the

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opportunity of the court to discover the true state of facts has been lessened. But in addition to this question of policy, as we before indicated, this court has no original jurisdiction in a case of this kind, and the question of the necessity of the sale of this land for the benefit of the heirs has never been before either the probate or the superior court. It was not raised by the issues in this case; this was an action simply to quiet title; there was no allegation that the sale had been made for the benefit of the estate; the respondents did not rest their case upon any such theory, but upon the theory alone that the deed to the appellants had been made for the purpose of defrauding the creditors of the grantor.

Not being able, then, to hold that the deed to Hallan and Nesbitt was made for the benefit of the estate, and that the sale should be confirmed by this court on the theory of the existence of the necessity for such sale, and it conclusively appearing that the land in dispute was community property, the appellants have plainly not been divested of their mother's interest in this land. Their right to the father's interest in our judgment depends entirely upon the legal proposition of whether or not the recording of the quitclaim deed by the father was in law a sufficient delivery of the same, for the testimony satisfies us that no other delivery was ever made. The testimony of the father in regard to the delivery of the deed to Amy Eley is contradicted by the testimony of Amy Eley herself,—besides, it bears upon its face the impress of falsity. But we think that, under all the authorities, the recording of the deed by the grantor is a sufficient delivery to convey title; at least, it is *prima facie* evidence of the intention to convey, and especially where the conveyance is for the benefit of

an infant. The undisputed rule seems to be that where the deed conveys a beneficial interest the infant will be presumed to have accepted it, for if such presumption did not attach, the infant, being unable to act, would always be excluded from receiving beneficial interests conveyed. Most of the cases hold that, in the case of the infant, this presumption is conclusive. There are a few cases, however, that hold that when it appears that the conveyance and recording was a scheme on the part of the grantor to defraud, not only existing creditors, but persons with whom he might in the future have business transactions, the deed should be held to be null and void for the reason that it was not the intention of the grantor to convey the land or deliver the deed, but those cases hold that it must take the strongest kind of proof to rebut the presumption of the intent to convey and deliver, where the deed is placed beyond the control of the grantor and where the deed of conveyance is made to an infant. But there is nothing in the testimony in this case to indicate that at the time the conveyance was made to these infants there was any scheme in the mind of the grantor to defraud creditors or any one else. And while it must be confessed that the testimony shows that he afterwards did scheme, and has continued to scheme up to the time of the commencement of this action, to deprive these respondents of the benefit of the improvements which they have been making upon this land, it would seem that this intention to defraud entered into the mind of the grantor Eley after he had conveyed the land to the appellants. There is no testimony on this subject excepting his own, and from that it appears that he was driven to the perpetration of this fraud upon Nesbitt and Hallan by his necessities, which arose

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Syllabus.

after the execution of the deed to the infants, and if it was his intention to convey the land to the appellants at the time the deed was executed and recorded, their rights irrevocably attached and could not be affected by any subsequent dishonest scheme entered into by their father.

This is an unfortunate case, but while it appears from the amended complaint that the respondents were ignorant of the fact that this land had, by prior deed, been conveyed to these appellants, they are in law guilty of negligence, for the record to which they are referred by the law for information on this subject discloses the existence of the deed to the appellants. The judgment in this cause must be reversed, and inasmuch as there seems to be no controversy over the facts in the case, a re-trial would be of no benefit, and the judgment will therefore be reversed with instructions to the lower court to dismiss the case at the cost of the respondents.

HOYT, C. J., and ANDERS and GORDON, JJ., concur.

[No. 1942. Decided July 7, 1896.]

DOLISKA B. DAVIS, *Administratrix, Appellant*, v. A. FORD *et al., Respondents*.

PLEADING — REPLY — INCONSISTENT DEFENSES — JUDGMENT ON PLEADINGS — ESTOPPEL — UNAUTHORIZED SALE BY ADMINISTRATRIX — FAILURE OF COURT TO MAKE FINDINGS — DISSOLUTION OF INJUNCTION — CONTINUANCE OF CONTRACT RIGHTS.

When one portion of a reply to an affirmative defense set up in the answer which alleges a contract between the parties authorizing the acts complained of, admits such contract, another portion of the reply denying the contract, on the ground that plaintiff had

15	107
15	120
15	107
33	632
15	107
699	351

no power to make it, should be stricken out on motion of the defendant therefor.

Error of the court in refusing to strike a reply upon defendants' motion, is cured by the action of the court in trying the case upon the theory that such reply was entirely irrelevant and immaterial.

Judgment on the pleadings is not authorized where a reply, though insufficient in law, has actually been filed to the affirmative matter in the answer.

Failure of the court to make special findings cannot be urged on appeal, where no requests therefor appear in the record.

Where an administratrix has sold timber upon lands of her intestate for a fair price to parties purchasing in good faith, and, after having received from them almost the whole purchase price and refused to receive the balance, the amount received having been appropriated to the use and benefit of herself and the estate, and accounted for in her report to the court, she cannot come into a court of equity and rescind her sale and deprive the purchasers of the benefits thereof simply on the ground that she was not authorized by the court to make the sale as required by statute.

Even if an unauthorized sale of timber by an administratrix was merely a license to cut and remove the timber, she is estopped from taking advantage of its invalidity, when the licensee has acted in good faith and paid her a valuable consideration therefor.

Where defendants have been improperly restrained from performing certain acts under a contract, which was to be terminated at a certain time, the court may properly, in refusing to continue the injunction, grant defendants such further time after the period for which their contract rights had been given as would be equivalent to what they had lost by the interference of the plaintiff in securing a restraining order.

Appeal from Superior Court, Skagit County.—HON. HENRY MCBRIDE, Judge. Affirmed.

Lindsay, King & Turner, and *Moore & Pittman*, for appellants.

Million & Houser, and *James O. Barrow*, for respondents.

The opinion of the court was delivered by

ANDERS, J.—In the month of May, 1891, one B. N.

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L. Davis died intestate in Skagit county, owning a large tract of land therein situated in sections 3, 4, 9 and 10, in township 34, north of range 4 east, and lying north of the county road leading from Mount Vernon to Clear lake, and between the Nookachamps creek and Skagit river. The plaintiff is the widow of the said deceased, and soon after his death was appointed administratrix of his estate. On March 8, 1895, as such administratrix, she brought this action in the superior court of Skagit county to enjoin the defendants from trespassing upon the lands above mentioned, and from cutting, removing and appropriating the timber thereon, and alleged in her complaint, among other things, that the defendants have wrongfully entered upon said land and premises and are now wrongfully and unlawfully trespassing thereon against plaintiff's will and without her consent, and are wrongfully and unlawfully cutting and removing the timber growing thereon and appropriating the same to their own use and benefit, and thereby causing great and irreparable injury to said estate; and that the defendants have refused to desist from so trespassing upon said lands and threaten to continue to cut, haul and appropriate said timber to their own use, and unless they are restrained by an order of this court they will cut, remove and appropriate all the timber of value growing on said lands, and asked for a temporary restraining order commanding the defendants, their agents, servants and employees to refrain from cutting, hauling, removing or appropriating to their own use any timber or logs growing on said land or belonging to said estate and from entering upon or trespassing on such lands or any part thereof; which restraining order was duly issued by the court.

The defendants, answering, denied that they had wrongfully entered upon the lands and premises described in the complaint, or were wrongfully upon said lands or against plaintiff's will or consent, or were trespassing thereon; that they were wrongfully cutting timber or removing timber growing thereon, or that they were wrongfully or unlawfully appropriating the same or any part thereof to their own use, and denied that they had caused great or irreparable injury to said estate or any damage or injury whatever. And for an affirmative defense the defendants alleged that on September 27, 1892, the plaintiff, as such administratrix, entered into a certain written contract of sale with the defendants, whereby she, as such administratrix, bargained, sold and conveyed to the defendants all the merchantable timber standing, lying and being upon all the land lying north of the county road leading from Mount Vernon to Clear lake in said county and west of the Nookachamps and between said county road and the Skagit river, located in sections 3, 4, 9 and 10, in township 34, north, range 4 east; that defendants were, by the terms of said contract, given until March 1, 1895, to cut and remove said timber, and were to pay the plaintiff therefor the sum of \$1,200; that the defendants, relying upon the representations of the plaintiff and her attorney, who drew the contract of sale, that plaintiff had full power and authority to execute said contract, entered into the same; that in pursuance of said agreement the defendants, on September 27, 1892, paid the plaintiff as such administratrix the sum of \$250 as part of the purchase price for said timber, and subsequently made other payments on account thereof, which are specified; that in September, 1894, it was mutually agreed between the plaintiff and the

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defendants, in consideration of the payment of \$75 by defendants to plaintiff, that the time for cutting and removing the said timber should be extended from March 1, to October 1, 1895; that at the time of the making of said contract and sale it was necessary for the plaintiff as such administratrix to raise funds with which to pay the debts of her intestate's estate and support the family, and that the contract was entered into by the plaintiff as such administratrix for the purpose of raising money with which to meet the expenses of administration and pay the debts and family allowances; that the said sale was made after full and careful investigation by plaintiff as to the worth and value of said timber, and that plaintiff at such time deemed it to the best advantage of the estate to make the sale; that said sale was fair and was to the best interest of all parties concerned; that the plaintiff and said estate have received the full value of the property so sold; that the plaintiff as such administratrix has accounted for the money paid to her by defendants and has appropriated the same to the use and benefit of the estate and has applied the same in payment of debts of the estate and in paying the family allowance ordered by the court in the matter of said estate to plaintiff and the minor children of plaintiff and her deceased husband; that in pursuance of, and immediately after the making of, said contract the defendants entered upon and took possession of said premises and put the same in a condition to enable them to cut and remove said timber by building roads, etc., and expended thereon the sum of \$1,200, and that such possession was taken and said improvements made with the knowledge, approval and consent of the plaintiff as such administratrix.

To this affirmative defense the plaintiff interposed a demurrer on the grounds that the facts stated were insufficient and that the court had no jurisdiction. The demurrer was overruled and an exception taken. The plaintiff then replied to the affirmative matter set up in the answer, admitting the making of a contract of sale of timber with defendants, but averring that the contract as made only included parts of the premises described in the complaint and answer, specifying them, and alleging that defendants were to have until October 1, 1894, in which to cut and remove said timber and that all of the timber on said lands had been cut and removed by the defendants. For a further reply to the defendants' affirmative defense plaintiff alleged that she had never obtained any authority from the court to enter into the contract mentioned and that she had no right or authority to make such contract or to sell said timber. She also alleged that the defendants had without any authority cut from other lands described in the complaint other timber which the defendants have appropriated or are about to appropriate to their own use, and for which she asked judgment against the defendants in the sum of \$1,371. The defendants moved to strike out the reply on the ground that it was not responsive to the complaint and not a proper reply, and to strike out the second affirmative defense set forth in the reply, for the reason that it was irrelevant and immaterial and not responsive to the issues of the case, which motions were denied and exceptions allowed. The defendants also moved for judgment on the pleadings and that motion was also denied and an exception noted.

It appears that the instrument of writing mentioned in the pleadings had been lost by the attorney for the

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plaintiff with whom it had been deposited for safe keeping, and both parties gave evidence as to its contents. Upon the trial the court found as facts that in September, 1892, the plaintiff, as administratrix of said estate, sold all the merchantable timber fit for logging purposes on certain specified portions of the premises described in the complaint and answer; that the contract of sale was in writing and that by its terms the defendants were to have until the first day of March, 1895, in which to cut and remove the timber, which time was for a certain consideration mentioned extended to October 1, 1895; that the defendants have removed from the premises included in the contract and other premises certain shingle bolts, but from the evidence it is impossible to determine what proportion thereof was taken from the premises included in the contract or was made from merchantable timber fit for logging purposes, and if ascertainable it would be immaterial as no judgment could be given therefor under the pleadings in this case; that at the time of said sale \$1,200 was a fair and reasonable price for said timber and at that time the estate was largely in debt, and that there never was sufficient personal property to pay the debts of the estate; that the plaintiff never applied to or obtained any order of the court for the sale of said timber; that the sale was never reported to or confirmed by the court; that said estate is still unsettled and in course of administration; that an order was made by the court in the matter of said estate allowing plaintiff and her minor children \$100 per month out of the estate for living expenses; that at about the time of the commencement of this action the plaintiff filed her account as such administratrix in which she in-

cluded and accounted for the money received by her from the defendants on account of the sale of said timber, which money has been indiscriminately used by her as such administratrix in paying debts of the estate, family allowances and expenses of administration. The court also found that the sale when made was to the best interest of the plaintiff, the heirs and creditors of the estate; that defendants purchased the timber in good faith, believing that the plaintiff had the power and authority to sell the same and that they relied upon and believed the statement of plaintiff's attorney that the sale was valid and that plaintiff was aware that the defendants were cutting and removing shingle bolts for more than a year prior to the commencement of this action, and that a certain note for \$200, due March 19, 1895, signed by defendants and two sureties and which was delivered to plaintiff in part payment for the timber, was not owned by plaintiff but by the First National Bank of Mount Vernon, but had been indorsed by her and she was liable thereon as such indorser, and that the defendants had paid said note since the trial of this case.

As conclusions of law the court found that the plaintiff was estopped to deny the validity of said sale and was estopped from objecting to the entering upon said premises by the defendants, their servants, agents and employees, and cutting and removing all the merchantable timber thereon fit for logging purposes, which should properly be removed by way of Blarney lake or Nookachamps, and that the injunction heretofore issued herein should be dissolved and dismissed in so far as the same forbids the cutting and removal of the merchantable timber fit for logging purposes on said premises; but that said injunction should re-

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main in force and be made perpetual in so far as it prevents the defendants, their agents, servants and employees from cutting and removing any timber from said premises, excepting merchantable timber fit for logging purposes only. And thereupon the court entered a judgment and decree in accordance with said conclusions.

The plaintiff appeals from the judgment and especially that part thereof denying the injunction as to cutting timber for logging purposes, and the defendants appeal from that part of the judgment awarding a permanent injunction prohibiting them from cutting timber fit for shingle bolts only. The defendants insist that the court erred in denying their motion for judgment on the pleadings as well as their motion to strike out the reply.

It will be remembered that the first affirmative reply to the new matter in the answer admitted a sale of the timber on parts of the land described in the complaint and answer, but alleged that defendants had cut and removed all the timber thereon. Standing alone that constituted a proper reply, for it controverted the affirmative defense set up in the answer, and was not in contravention of the code declaring that any new matter, not inconsistent with the complaint, constituting a defense to the new matter in the answer may be set up in the reply. Code Proc., § 199. A reply like that we are now considering was known at common law as a new assignment and was recognized as proper pleading. But when the plaintiff in her so-called second defense set forth in effect that she never made the contract which she admitted in the first, because she had not the power or authority to make it, she assumed a position wholly inconsistent with that taken in her first defense. We think, therefore, the

reply, or at least that portion which we have designated as the second defense, should have been stricken out on defendants' motion. But this error was in effect cured by the action of the court in disregarding that portion of the reply and trying the case apparently upon the theory that it was entirely irrelevant and immaterial. The motion for judgment on the pleadings was, we think, properly denied. If the motion to strike out the reply had prevailed the plaintiff would have been entitled, in the discretion of the court and upon just terms, to file a new pleading. It is only in cases where no reply whatever has been filed to the affirmative matter in the answer that judgment on the pleadings is authorized by the code, and not where a reply has actually been filed and found to be insufficient in law.

Plaintiff has assigned several errors on the findings and conclusions of the court, and also on the failure of the court to make certain other findings, but the latter objections cannot be here considered, for the reason that no requests for special findings appear in the record. The plaintiff, however, predicates the argument in her brief mainly and in fact almost wholly, upon the proposition that her contract of sale was void and that therefore she is not estopped by it from claiming the relief demanded.

Several cases are cited holding that infants and married women not *sui juris* are not estopped by their contracts or deeds to claim property sold and conveyed by them. Those decisions are based upon the very just principle that it is the duty of the courts to protect that class of persons from the consequences of contracts and transactions which they have no legal capacity to make or to enter into. One case is cited and confidently relied upon by plaintiff in support of

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her contention, in which it was held that an administratrix might enjoin the laying down and opening of a public road by the county authorities over the estate of her intestate, notwithstanding the fact that she as such administratrix had previously consented that the road might be so opened. See *Rush v. McDermott*, 50 Cal. 471. The consent of the administratrix in that case was but a bare license, without consideration, and she had a perfect right, under all of the authorities, to revoke it and prevent the estate from being taken for the purposes and by the method proposed.

But, while we are not disposed to find fault with the decisions in any of the cases cited, and while we concede that an administrator's sale without an order of the court is void and passes no title to the thing sold as against the real owner, it does not necessarily follow that an administrator or administratrix who has made a sale of property of his or her intestate without complying with the provisions of law, can successfully invoke the aid of the court of equity to annul it. The plaintiff insists that, if the principle of estoppel be applied in this case, it results in making an act valid which the law declares invalid. But we do not think so. The question is not as to the validity or invalidity of the sale, but is, can the plaintiff, after having sold this timber for a fair price to the defendants who purchased it in good faith, and after having received from them almost the whole purchase price and refused to receive the balance, and after having appropriated the amount received to the use and benefit of herself and the estate, and accounted for the money so received in her report to the court, come into a court of equity and rescind her sale and deprive the defendants of the benefits thereof simply on the ground that she had no right to make it? Upon the

plainest principles of equity and justice we think she ought not to be permitted to do so. She asks equity and yet does not propose to do equity. In other words, she proposes to avoid her own sale and reclaim a part of the property sold, without returning or offering to return a corresponding portion of the purchase price which she has received. This is therefore a case in which the well known maxim, that "he who seeks equity must do equity," ought to be applied.

An act of the legislature of Tennessee declared all sales by executors or administrators of slaves of their testator or intestate, without an order of the circuit or chancery court of the county, to be void, and yet the supreme court of that state held, in *Herron v. Marshall*, 5 Humph. 443 (42 Am. Dec. 444), that an administrator who had sold a slave contrary to the provisions of the statute was estopped from bringing an action to recover the property so sold, "upon the well-settled principle that a man shall not be permitted to set up his own illegal acts to vitiate his own contracts; in other words," says the court, "we think that the executor or administrator would, in a suit against their vendee, be estopped from saying that they had violated the statute in selling the negro."

In *Bragg v. Massie's Adm'r*, 38 Ala. 89 (79 Am. Dec. 82), the court decided that a private sale by an administrator of a slave of his intestate estopped him from recovering the slave, and that after the sale had been completed by delivery, and the slave had again come into the possession of the administrator, the latter could not interpose the invalidity of the sale as a defense in an action against him by the vendee for possession.

And in Schouler on Executors and Administrators, (2d ed.), § 360, it is said that a legal representative

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cannot avoid his own sale or pledge though guilty of a breach of trust in making it.

The principle announced in these authorities is also fully applicable to the case at bar, and we think the court was right in holding that the plaintiff could not be heard to say, in order to avoid the sale, that she violated the statute in making it. Indeed, a court of equity, under such circumstances as are disclosed in this case, would not permit even the heirs of the intestate to recover the property sold without refunding the proceeds of the sale to the purchasers. *Valle's Heirs v. Fleming's Heirs*, 29 Mo. 152 (77 Am. Dec. 557); Freeman, Void Judicial Sales (2d ed.), § 53.

It is claimed, however, by the plaintiff that the contract under consideration was at most a mere license to cut and remove timber, and that she had a right to revoke, and, by instituting this action, did revoke it. But it is a sufficient answer to this proposition to observe that in our opinion the same principle which estops her from setting up a void sale, prevents her from taking advantage of an invalid license, as she had no more power or authority to grant a license to remove timber than she had to make a sale of it.

Objection is made to the ruling of the court as to the ownership of the note given by defendants to plaintiff, and as to the adjustment of the costs. But we think the finding that the note was owned by the bank, if material, is sustained by the evidence, and the ruling as to the costs constitutes no sufficient ground for a reversal of the judgment, as it was in accordance with the equities of the case.

We fail to find any substantial error either in the findings of fact or conclusions of the court, and the judgment is therefore affirmed at the costs of the plaintiff, and the defendants will have as much time

after the remittitur is sent down in which to cut and remove the timber to which they are entitled under the terms of the sale and the decree as they would have had if this action had not been instituted.

HOYT, C. J., and DUNBAR and GORDON, JJ., concur.

Per Curiam.—In the opinion heretofore filed in this case, *ante*, p. 107, it was said that “the defendants will have as much time after the remittitur is sent down in which to cut and remove the timber to which they are entitled under the terms of sale and the decree as they would have had if this action had not been instituted.” And the defendants now move this court to add thereto the following: “That such time be given during the year 1897, covering the same months of the year, that these defendants would have had during the year 1895 had not this suit been instituted.”

This motion is accompanied by affidavits showing that it is impracticable to cut and remove timber at or near Nookachamps creek and Blarney lake during the winter months, owing to excessive rain fall. If this fact had been brought to our attention before the opinion was prepared, the order requested would have been included therein; and as the request seems reasonable and proper under the circumstances, and as we are unable to perceive how the plaintiff can be in any wise injured by granting it at this time, the motion is hereby granted and the defendants are given the same time during the year 1897, and including the same months of the year, that they would have had during the year 1895 had not this suit been instituted.

[No. 2077. Decided July 7, 1896.]

THE STATE OF WASHINGTON, *Respondent*, v. JOSEPH
CARTER, *Appellant*.

HOMICIDE — INSTRUCTIONS — SELF-DEFENSE — APPARENT DANGER —
DUTY OF ASSAULTED TO RETREAT — CREDIBILITY OF WITNESS.

The fact that the court explains to the jury the nature and legal effect of defendant's plea is not open to the objection that it is a judicial comment on the facts instead of the law.

The fact that the court charges the jury in one place in its instructions that the defendant claims the homicide was in self-defense on the part of defendant, "to prevent death to himself or serious bodily injury," is not prejudicial when other parts of the instructions make it clear that the defendant had the right to act upon apparent, as distinguished from actual, danger.

Where the court in the course of a charge to the jury states plainly and emphatically that the defendant might invoke the law of self-defense to protect his life or person from great "bodily harm," it is not prejudicial error to also charge that "there can be no successful setting up of self-defense by a defendant unless . . . to save his own life or his person from *dreadful* harm or severe calamity."

While an instruction, in a case of homicide, may be so inapt as to imply that it was the duty of defendant to have retreated when assaulted, unless it would have been more hazardous to have done so, it can not be held prejudicial when the jury are also charged "that a person being where he had a right to be and without fault is violently assaulted, may, without retreating, repel force by force."

A charge to the jury that they are warranted in disregarding the testimony of any witness if they believe that he has wilfully testified falsely to any matter is not prejudicial, when the error of the court in not stating that the falsity should be in a material matter was not raised by the exception taken, nor the court's attention called to the inadvertence at the time.

Appeal from Superior Court, King County. — Hon.
CARROLL B. GRAVES, Judge. Affirmed.

Brady & Gay, and *McBride Bros.*, for appellant.

A. W. Hastie, Prosecuting Attorney, and *J. T. Ronald*, for The State.

The opinion of the court was delivered by

GORDON, J.—The appellant was convicted in the superior court of King county of the crime of manslaughter, and sentenced to imprisonment in the state penitentiary at Walla Walla for a period of ten years, from which judgment and sentence he has appealed.

The information upon which he was tried charged him with the murder of one Charles D. Ling. The deceased—a Chinaman—was cook, and the appellant was a deck hand on the steamer Idaho, plying between the city of Seattle and down sound ports. It appears from the record that the appellant complained of the quality of the coffee served by the deceased at the mess table on the morning of the fatal encounter. Angry words ensued and the appellant left the table and went toward the galley (within which the deceased was stationed), with the intention, as appellant says, of securing his hat which he had left near the galley door, and entering complaint with the master of the boat against the cook. The state's theory, however, is that his object was to assault the deceased. It seems that the parties came together just within the galley door at a point where they could not be seen by other employees then breakfasting. The affray terminated in the death of the deceased, resulting from a wound inflicted upon him with a butcher knife in the hands of appellant.

The errors relied upon for reversal are, first, that the evidence is insufficient to justify the verdict, and second, that the court erred in its charge to the jury.

1. We have examined the record carefully and

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think that the verdict is not without sufficient legal evidence to support it. It accords with the theory of the state and there was abundant testimony advanced in support of that theory.

2. It is alleged by counsel for appellant that the court erred in giving the following instruction :

"The defendant invokes the law of self-defense and claims that said killing was done necessarily and in the necessary defense of his person or to prevent death to himself or serious bodily injury on the part of the deceased."

The objection is that it is an "instruction upon the facts instead of the law." Also that it is in conflict with that part of the charge "that only holds the defendant responsible for apparent danger."

We think neither of these objections is well taken. We think there was no impropriety in the court's explaining to the jury the nature and legal effect of defendant's plea; and the latter portion of the instruction must be considered in the light of the entire charge, and when so considered it is plain that the jury were given to understand that it was the right of the defendant to act upon the "apparent," as distinguished from the "actual" danger. In fact, the court expressly charged that —

"A person need not be in actual imminent peril of his life or great bodily harm before he may defend himself. It is sufficient if in good faith he has a reasonable belief from the facts, *as they appear to him at the time*, that he is in imminent danger; if he honestly believes such to be the case then he had a right to act in self-defense."

Further :

"The term 'apparent danger' is to be understood as meaning not apparent danger in fact, but apparent danger as to defendant's comprehension; that is, did

the defendant believe there was an apparent danger of being killed or of great bodily harm being inflicted upon his person at the time of the alleged stabbing."

3. Complaint is also made that the court erred in the following charge :

"There can be no successful setting up of self-defense by a defendant unless the taking of his adversary's life is the only reasonable resort of the party to save his own life or his person from dreadful harm or severe calamity, felonious in its character."

It would have been better had the court not used the word "dreadful," but we do not think that its use was prejudicial to the defendant. The court had already twice told the jury that the defendant might invoke the law of self-defense to protect his life or person from great "bodily harm," and this was emphatically stated to the jury at several subsequent points in the instructions.

4. Another portion of the charge complained of is as follows:

"Where a man without fault on his part is suddenly and violently assaulted under such circumstances as to induce in his mind an honest and reasonable ground of apprehension that he is in danger of life or limb, and the assault is of such fierceness as to make an attempted retreat even more hazardous, he may at once use necessary force to prevent the threatened blow."

It is contended that this was in effect telling the jury that it was the duty of the appellant to have retreated unless it would have been more hazardous to have done so. The instruction was inapt, and in a sense misleading, and if it stood alone we would not hesitate, upon the authority of *State v. Cushing*, 14 Wash. 527 (45 Pac. 145), to condemn it, but in this connection, and upon the subject of retreat, the court

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expressly told the jury that "where one is assaulted in a place where he has a right to be *he does not need to retreat or run, but may stand his ground and defend himself even to the extent of taking human life,*" and in a later part of the charge the court again adverts to the subject, saying "that a person being where he had a right to be and without fault is violently assaulted, may, without retreating, repel force by force."

Nothing is better settled than that the meaning and force of instructions are not to be determined by selecting detached portions of the charge, but all that is said upon a particular subject must be considered, and the application of this rule to the charge now under consideration does no violence to the rule pertaining to inconsistent instructions.

5. It is also claimed that the court erred in charging as follows:

"I charge you, gentlemen, that you will be slow to believe that any witness has wilfully testified falsely, but if you believe that any witness in this case has wilfully testified falsely to any matter, then you are at liberty to disregard his testimony entirely except in so far as the same may be corroborated by other credible testimony in the case."

This instruction was technically incorrect in that it omits the word "material," but we do not think that the error is of sufficient gravity to warrant a reversal of the judgment. It was clearly a mere inadvertence, and the attention of the trial court should have been called to it at the time; but this was not done. Neither was the character of the exception such as to indicate the error relied upon.

Other errors predicated upon the charge have been considered but we deem none of them of enough importance to require particular notice. A careful consideration of the entire charge satisfies us that it was,

in every phase of the case, fair to the defendant, and did not prejudice any substantial right to which the law entitled him. It follows that the judgment and sentence must be affirmed.

HOYT, C. J., and DUNBAR, ANDERS and SCOTT, JJ., concur.

15	126
33	60
33	195

[No 2146. Decided July 8, 1896.]

NATIONAL BANK OF COMMERCE OF SEATTLE, *Respondent*, v. SEATTLE PICKLE AND VINEGAR WORKS, *Appellant*.

TRIAL—EXCEPTIONS TO FINDINGS—WHEN TAKEN—POWER OF COURT TO EXTEND TIME.

Where exceptions to findings of fact and conclusions of law are not taken within five days after their filing, as required by Laws 1893, p. 112, § 3, they are insufficient to secure a review in the appellate court of the evidence upon which they are based.

The act of March 15, 1893 (Laws 1893, p. 415, § 24), providing that "the court may enlarge or extend the time, for good cause shown, within which by statute any act is to be done, proceeding had or taken, notice of paper filed or served, or may . . . permit the same to be done or supplied after the time therefor has expired," does not relate to nor govern proceedings subsequent to the entry of judgment, as the title of the act indicates that it is merely "An act to provide for the manner of commencing civil actions in the superior courts, and bringing the same to trial."

Appeal from Superior Court, King County.—Hon. RICHARD OSBORN, Judge. Appeal dismissed.

Joslin, Denny & Bailey, for appellant.

Elder & Harger, for respondent.

The opinion of the court was delivered by

GORDON, J.—Upon the trial of this cause in the

court below a jury was expressly waived, and judgment was entered in favor of the respondent, (plaintiff below,) on July 10, 1895, upon findings of fact and conclusions of law duly made and filed. Thereafter a motion for a new trial was made and overruled. On October 5, 1895, the appellant procured an order from the trial court permitting exceptions to the findings of fact and conclusions of law to be entered, and thereafter, on October 9, 1895, exceptions to the findings were made and filed.

A motion has been made in this court to strike the exceptions and to affirm the judgment for the reason that exceptions were not taken within the time prescribed by law. Section 3 of the act of March 8, 1893, (Laws 1893, p. 112), requires exceptions to the findings of fact or conclusions of law to be taken within five days after the filing of the same. And we have held that we could not review the evidence in the absence of such exceptions. *Rice v. Stevens*, 9 Wash. 298 (37 Pac. 440); *Irwin v. Olympia Waterworks*, 12 Wash. 112 (40 Pac. 637).

Appellant relies upon § 24 of the act of March 15, 1893, (Laws, p. 415) which provides that:

"The court may enlarge or extend the time, for good cause shown, within which by statute any act is to be done, proceeding had or taken, notice of paper filed or served, or may, on such terms as are just, permit the same to be done or supplied after the time therefor has expired."

But we do not think that section is applicable to the question here presented. The act of which that section is a part is entitled,

"An Act to provide for the manner of commencing civil actions in the superior courts, and *bringing the same to trial*,"

and obviously does not relate to nor govern proceedings subsequent to the entry of judgment. Section 3 of the act of March 8, on the other hand, is specific and fixes the time within which the exceptions must be taken.

We think it clear that the motion to strike the exceptions should prevail, and as nothing remains of record to be considered, the judgment appealed from will be affirmed.

HOYT, C. J., and ANDERS, SCOTT and DUNBAR, JJ., concur.

[No. 2184. Decided July 8, 1896.]

C. S. MOODY, *Appellant*, v. C. J. NOYES *et al.*, *Respondents*.

TRUSTS—POWERS OF TRUSTEE HOLDING LEGAL TITLE—ESTOPPEL—
EQUITY—ENFORCEMENT OF LIENS.

The authority of a trustee to deal with real property, the legal title of which has been vested in him by the *cestui que trust*, cannot be questioned by third parties dealing with him, so long as such authority is not denied by the *cestui que trust*.

Where timber has been cut from land under authority of a license granted by an agent, the licensee and his assigns are estopped to deny the authority of the agent to execute the license.

Contracts made by the trustee of a corporation may be enforced by it in its own name.

A lien by contract is enforceable in equity, although the contract does not amount to a legal mortgage.

Where the object of an action is to have the interest of the defendant established and the priorities adjusted as between plaintiff and defendant, plaintiff cannot complain that defendant, although holding nothing more than a lien interest in the property, is awarded the priority of lien, when the evidence sustains such a finding.

July, 1896.]

Argument of Counsel.

Appeal from Superior Court, Skagit County. — Hon. HENRY McBRIDE, Judge. Affirmed.

Million & Houser, for appellant.

Condon & Wright, for respondent, Puget Mill Company.

Conceding for the moment that this respondent never had more than a lien interest in the property in question as security for a debt, yet it is entitled to have the court establish its interest and adjust the priorities between appellant and respondent. In so doing, the court will but decide an issue proposed by the appellant himself in his complaint. If this respondent has an equitable lien upon the property in question, a court of equity will enforce such a lien against one intermeddling with the mortgaged property. *Wetzel v. Webb*, 33 Pac. 1105; *Taylor v. Felder*, 23 S. W. 480; *First National Bank v. Sproull*, 16 South. 879; *Sibley v. Ross*, 50 N. W. 379.

If it shall be held that Noyes cut the timber under the authority of the Ledger license, then Noyes and Moody, as well as Ledger and all his privies are estopped from denying Walker's authority to execute the license and his ownership of the premises. For Moody cannot at once claim the benefit of the Ledger license and repudiate its obligations. *Hall v. Solomon*, 23 Atl. 876; *Waco Bridge Co. v. City of Waco*, 20 S. W. 137; *Glynn v. George*, 20 N. H. 114; *Hamilton, etc., Co. v. Cincinnati, etc. R. R. Co.*, 29 Ohio St. 341; *Bigelow, Estoppel*, (5th ed.), 542.

Parties may by contract create a lien enforceable in equity, though the transaction does not amount to a legal mortgage. *Wood v. Holly Mfg. Co.*, 13 South. 948; 1 Jones', Liens, ch. 2. An owner of land who

licenses another to come on his land and cut timber to be paid for at an agreed price, can by the terms of his license retain a lien. *Sawyer v. Fisher*, 32 Me. 28; *Prentiss v. Roberts*, 49 Me. 127. Similarly a landlord can in a lease reserve a lien for rent upon the crops to be thereafter planted. *Sunol v. Molloy*, 63 Cal. 369.

The opinion of the court was delivered by

DUNBAR, J.—The court in this case found that on the 4th day of October, 1892, the defendant Noyes executed a chattel mortgage for a valuable consideration to the appellant Moody upon the logs which are the subject of this controversy, that the chattel mortgage was duly verified, acknowledged and recorded; that one Cyrus Walker was, and since has been, the owner in fee simple and of record, in trust for the Puget Mill Company, respondents herein, of the land from which the logs were cut, and that upon the said 5th day of June, 1889, while the said real estate was thus owned by the said Cyrus Walker and the Puget Mill Company, said Cyrus Walker, for himself, and as agent of said Puget Mill Company,—he being duly authorized to act in the premises,—executed to one Frank Ledger a license to cut and haul timber from the said above described land, and the said Frank Ledger in consideration thereof, for himself, his heirs and assigns, agreed to pay to the said Cyrus Walker as agent as aforesaid by way of stumpage for such timber the sum of \$1.50 per thousand feet, board measure, for all logs so cut and hauled, and in the said license it was expressly agreed that the said Cyrus Walker should have a lien upon all logs and timber cut upon said premises under the said license to secure the sum of \$1.50 per thousand feet reserved for stumpage as aforesaid; that the said license was

July, 1896.] Opinion of the Court—DUNBAR, J.

duly acknowledged and recorded upon the 6th day of July, 1889; that the said Ledger subsequently to the 5th day of June, 1889, and prior to the said 20th day of September, 1892, transferred and assigned to the said C. J. Noyes all his right and interest in the said license; that the said Noyes under and by virtue of the said license and assignment thereof, entered upon the land therein described in September, 1892, and cut therefrom the logs in controversy, and thereby became the owner of such logs, subject only to the lien reserved in the license above described. Many other findings were made by the court, but we think a recital of these sufficient for the purposes of this opinion.

An action was brought by the appellant to foreclose this chattel mortgage, Noyes defaulted, and the court entered a decree granting judgment in favor of the appellant against Noyes for the amount asked for, but subjecting their lien to the lien of the respondents, viz., the sum of \$1.50 per thousand feet, and from this judgment appeal is taken.

Briefs, somewhat elaborate, have been prepared by counsel in this case, but we think the contention of the appellant cannot be sustained. The findings of the court are sustained by the testimony, and in our judgment the findings of facts sustain the law announced by the court.

The respondent, together with Walker as its trustee, having a legal title, could deal with the premises as the legal owner, subject to be called to account only in a matter concerning the *cestui que trust*, and it could maintain an action in its own name in any matter affecting the trust property. By investing Walker with the legal title, as shown by the pleadings and the testimony, they created him their agent, and

third parties, especially where notice is given of the action of the agent by record, as in this case, cannot question his authority so long as it is not denied by the *cestui que trust*.

We are also inclined to think from the record that Noyes cut the timber under the authority of the Ledger license, consequently Noyes, Moody and Ledger are estopped from denying Walker's authority to execute the license. We have examined the authorities cited by appellant under paragraph one of his brief, but do not think that they are in point. So far as the right of lien in the respondents is concerned in this case, this was a lien by contract, and was enforceable in equity although the contract did not amount to a legal mortgage. See 1 Jones on Liens, § 27 *et seq.*

But even if it be conceded that the respondent had nothing more than a lien interest in the property, he is entitled to have the interest established and the priorities adjusted: that was the object the appellant had in bringing it into court, and the deciding of this issue and establishing the priorities was in response to appellant's demand. It is an equitable proceeding; the parties in interest were before the court; the priorities were adjusted under competent testimony; and it seems to us in accordance with the right, as the facts were portrayed by the testimony.

The judgment will, therefore, in all things be affirmed.

HOYT, C. J., and ANDERS, GORDON and SCOTT, JJ., concur.

July, 1896.] Opinion of the Court—DUNBAR, J.

[No. 2015. Decided July 9, 1896.]

TACOMA LAND COMPANY, *Appellant*, v. CITY OF TACOMA
et al., *Respondents*.

MUNICIPAL CORPORATIONS—STREET IMPROVEMENTS—ESTOPPEL OF
PROPERTY OWNER.

Although the resolution of the city council authorizing a street improvement, and the notice given thereof, may be illegal, a property owner is estopped from raising objection thereto, when, subsequent to such resolution and notice, he had executed a release of damages and signed the petition for the proposed improvement and requested the city to go on with the work and assess his property.

Appeal from Superior Court, Pierce County.—Hon
JOHN C. STALLCUP, Judge. Affirmed.

Tillotson & Milligan, for appellant.

James Wickersham, *Stacy W. Gibbs*, *R. B. Lehman*,
B. F. Heuston, and *T. W. Hammond*, for respondents.

The opinion of the court was delivered by

DUNBAR, J.—After the resolution was passed and notice given to grade the street in controversy, which, under the case of *Buckley v. Tacoma*, 9 Wash. 269 (37 Pac. 446), must be conceded to have been illegal, the appellant executed a release of damages and signed the petition for the improvement and requested the city to go on with the work and assess its property.

Briefs have been prepared with great care and at considerable length by all the parties to this case, but it seems to us that, under the authority of *Barlow v. Tacoma*, 12 Wash. 32 (40 Pac. 382); *Travis v. Ward*, 2 Wash. 30 (25 Pac. 908); and *Wingate v. Tacoma*, 13 Wash. 603 (43 Pac. 874), the appellant is absolutely

estopped from raising any objection to the legality of this assessment, and the judgment will therefore be affirmed.

HOYT, C. J., and ANDERS, GORDON and SCOTT, JJ.,
concur.

[No. 2189. Decided July 9, 1896.]

FRANK BURNS, JR., *et al.*, *Appellants*, v. JAMES H.
WOOLERY, *Sheriff, et al.*, *Respondents*.

TRIAL OF RIGHT TO PROPERTY — FRAUDULENT CONVEYANCE — QUESTION
FOR JURY.

Plaintiff is not entitled to a directed verdict in his favor, upon a trial of the right of ownership to property, attached as the property of another, but which was claimed by plaintiff under a bill of sale, when there is any testimony tending to show that the transfer to plaintiff was made with intent to hinder, delay or defraud creditors.

Appeal from Superior Court, King County.—Hon.
RICHARD OSBORN, Judge. Affirmed.

Action involving claim of the plaintiff, Burns, to 800,000 brick levied upon by the sheriff of King county under a writ of attachment in a cause wherein the respondents Konnerup and Nagorsen were plaintiffs and the Wayne Brick & Tile Company was defendant. A bill of sale having been made to Burns he filed with the sheriff his affidavit of ownership and executed the statutory bond entitling him to the possession of the brick. Upon a trial of the right of ownership, verdict and judgment were rendered for defendants.

Donworth & Howe, for appellants.

Richard Winsor, and *George E. Morris*, for respondents.

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Opinion Per Curiam.

Per Curiam.—The first error assigned by the plaintiff is the action of the superior court in refusing to instruct the jury to find for plaintiff as requested by the plaintiff. An examination of the testimony in this case does not convince us that the undisputed evidence showed the title to the property or the right to its possession in the plaintiff, but that there was sufficient evidence to go to the jury upon the question of whether the bill of sale was made with intent to hinder, delay or defraud creditors. While it is true in some cases that whether fraud has been committed becomes a question of law, yet, under all the circumstances of this case, we think there was sufficient testimony concerning fraud in the transactions alleged, which were purely questions of fact for the consideration of the jury, and that the court would not have been warranted in withdrawing the case from the jury or in giving the instruction asked for by the plaintiff.

The next two assignments of error are in regard to the instructions given by the court, and without specially reviewing them we think the instructions as a whole were correct, and that nothing contained in them in any particular had a tendency to mislead the jury.

The fourth alleged error is that the judgment was too large. Under the rule announced by this court in *Union Savings Bank and Trust Co. v. Gelbach*, 8 Wash. 497 (36 Pac. 467), this contention cannot be sustained.

The judgment is affirmed.

Hoyt, C. J.—I do not agree to this opinion.

[No. 2197. Decided July 9, 1896.]

JOHN GRADEN *et al.*, *Appellants*, v. A. S. TURNER, *Respondent*.

EXECUTION—LEVY AND SALE—INDIVIDUAL INTEREST IN PARTNERSHIP
PROPERTY.

Under Code Proc., § 802, providing that when a defendant owns personal property jointly or in copartnership with any other person, and the interest cannot be separately attached, the sheriff shall take possession of the property, unless bond be given, and shall proceed to sell the interest of defendant, the sheriff, or, in proceedings in a justice's court, the constable, is authorized to levy execution upon partnership property to satisfy a judgment against an individual partner.

Appeal from Superior Court, Snohomish County.—
Hon. JOHN C. DENNEY, Judge. Affirmed.

Coleman & Hart, for appellants.

Bell & Austin, for respondent.

The opinion of the court was delivered by

DUNBAR, J.—The appellants were co-partners, and were lawfully in the possession of a certain lot of saw-logs, when the respondent, as constable, and by virtue of executions against the property of one of the appellants, Adolph Plate, a member of said firm, levied upon all of Plate's interest in said sawlogs and took them into his possession for the purpose of selling said interest to satisfy the executions which he held. After the taking, appellants demanded the return of the logs from respondent, which, being refused, they brought this action of claim and delivery to recover possession of them. They gave the bond provided for by statute, took the logs into their possession, subsequently sold the same and applied the

July, 1896.] Opinion of the Court—DUNBAR, J.

proceeds thereof to the payment of the debts of the co-partnership. The case was tried to the court, who held that the respondent as constable was entitled to levy upon the interest of Plate in the said logs, and sell the same and that the action brought by the appellants would not lie.

It is contended by the appellants that upon an execution against one partner, the sale cannot be made of any specific chattel belonging to the partnership, but that in such a case a levy and seizure are held to be a trespass. The appellants have collated a great number of authorities on the question of how the interest of a partner in a partnership may be levied upon in an execution, and sold to satisfy his individual debts. They admit that the authorities are divided upon the proposition, but insist that the better reasoned cases support their view.

Interesting as the discussion presented in the brief of appellants may be as a general proposition of law, we think the authorities cited have no application in this state by reason of our statute, which especially provides, (§ 802, Code of Procedure), that when a defendant

“Owns personal property jointly or in copartnership with any other person, and the interest cannot be separately attached, the sheriff shall take possession of the property, unless the other person having an interest therein shall give the sheriff a sufficient bond, with surety, to hold and manage the property according to law; and the sheriff shall then proceed to sell the interest of the defendant in such property, describing such interest in his advertisement as nearly as may be, and the purchaser shall acquire all the interest of such defendant therein.”

This provision of the law is so direct and definite

that it seems to us that it leaves nothing to be said on the proposition.

It is contended by the appellants that this law has reference only to executions issued out of the superior court, but we do not think it was the intention of the legislature to provide one remedy for judgment creditors in the superior court, and another and different remedy for judgment creditors in the justice's court.

Nor can the second objection of appellants prevail, that it does not apply to a levy upon the partnership, but only to a levy upon joint or common owners, for the language of the law is, "when he owns personal property jointly or in copartnership with any other person." We think there is nothing in this case which would take it from the provisions of the statute above referred to, and the judgment will therefore be affirmed.

HOYT, C. J., and SCOTT, ANDERS and GORDON, JJ., concur.

[No. 2210. Decided July 9, 1896.]

NORTH RIVER BOOM COMPANY, *Respondent*, v. ISAAC SMITH *et ux.*, *Appellants*.

APPROPRIATION OF TIDE LANDS BY BOOM COMPANY — PARTIES — CONSTITUTIONAL LAW — SPECIAL PRIVILEGES — APPEAL — ERRORS NOT URGED — MISCONDUCT OF CLERK.

The state is not a necessary party to an action for the appropriation by a boom company of tide lands, which the state has contracted to sell, as the state's interest in land is not subject to condemnation.

The alleged unconstitutionality of the act conferring upon boom companies the right of eminent domain, owing to defect in the title

15	138
27	614
15	138
438	508

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of the act, will not be considered on appeal, when not raised in the court below nor in the briefs in the supreme court.

A law conferring the right of eminent domain upon boom companies is not open to the objection that it contravenes the constitutional prohibition (art. 2, § 28) against the enactment of special laws granting corporate powers or privileges.

The fact that one instruction given by the court had been inadvertently withheld by the clerk, upon a request from the jury during their deliberations to have the instructions sent them, cannot be urged as error, in the absence of any showing that the appellant was prejudiced by such omission.

Appeal from Superior Court, Pacific County.—
HON. FRED L. RICE, Judge *pro tem*. Affirmed.

Richard K. Boney (*Elwood Evans*, of counsel), for appellants.

Turney & Ferrandini, and *Welsh & Thorp*, for respondent.

The opinion of the court was delivered by

DUNBAR, J.—This is an appeal from a judgment rendered in an action brought to appropriate certain tide lands of the third class for boom purposes. A demurrer was interposed to the complaint, which was overruled. The defendants answered, and, upon trial, certain damages were awarded to the defendants, with which they were not satisfied, and from which judgment they have appealed to this court.

We think the petition stated facts sufficient to constitute a cause of action. The contention that the state should have been made a party to the action was fully disposed of by this court in *Seattle & M. Ry. Co. v. State*, 7 Wash. 150 (38 Am. St. Rep. 866, 34 Pac. 551), where it was held that the state's interest in land was not subject to condemnation. The state, through its authorized agent, the legislature, having authorized the boom company to enter upon the lands, and

giving to the boom company an easement therein, and having contracted in this instance with the appellants for the purchase of the land, there is no interest to be condemned except the interest of the appellants. This, it seems to us, disposes of the main contention in the case.

The main argument made by one of the attorneys for appellants, to the effect that the act of March 17, 1890, (Laws 1889-90, p. 470), conferring upon boom companies the right of eminent domain, is unconstitutional, on the ground of defect in the title of the act, was not raised in the court below, or upon the briefs here, and will therefore not be considered.

There was one constitutional question raised, however, and that was that said act was contrary to the provisions of the state constitution prohibiting the enactment of such laws granting corporate powers or privileges, viz., § 28 of art. 2 of the constitution. There was no authority, however, cited to sustain this contention; nor do we think that any can be found. It is well settled that boom companies are *quasi* public corporations, and that the legislature has power to authorize them to condemn property under the right of eminent domain, and that the use of such land by such companies is a public use, inasmuch as it tends to promote the productive power of any considerable number of the inhabitants of the section of the state, and leads to the creation of new channels for the employment of private capital and labor. 7 Lawson, Rights, Rem. & Prac. § 3885, and cases cited. In fact, the overwhelming, and we think uniform, decisions of the courts under constitutions similar to ours in this respect, sustain this law.

We think the court gave the proper instructions to

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Syllabus.

the jury in the case, and that no error was committed in the trial thereof.

During the deliberations of the jury, they requested the clerk to send them the instructions of the court. The clerk attempted to comply with the request of the jury, but, through a mistake, omitted to send a certain instruction which had inadvertently become separated from the rest. This instruction, it is claimed, was beneficial to the defendants; and because of the failure of the jury to receive said instruction after they had retired, appellants moved the lower court to set aside the verdict of the jury, and assign as error the overruling of said motion by the court. Conceding the irregularity claimed by the appellants, and conceding, without deciding, that the jury had a right to the instructions at all, in the absence of any showing, by affidavit or otherwise, that the defendants were prejudiced by the fact that this instruction was inadvertently omitted from the jury, we would not be justified in reversing the case.

Believing that the record discloses no prejudicial error in any particular, the judgment will be affirmed.

HOYT, C. J., and GORDON, J., concur.

15	142
17	424

[No. 2190. Decided July 10, 1896.]

MILLER MURDOCH, *Respondent*, v. MARTHA E. LEONARD
et al., *Appellants*.

REFORMATION OF MORTGAGE — MUTUAL MISTAKE — PLEADING — PARTIES
 — CONTRACT OF MARRIED WOMAN — EVIDENCE OF OWNERSHIP OF
 MORTGAGED PROPERTY — FAILURE TO DO EQUITY.

The fact that the complaint, in an action for the reformation of a mortgage, does not in express terms aver that the mortgage was erroneously executed through "mutual mistake" will not render it insufficient, if it sets up facts from which such a conclusion is inevitable.

The deed or contract of a married woman may be reformed in this state, in cases of mutual mistake, since § 1410, Gen. Stat., does away with the wife's legal disability to contract.

In an action to reform and foreclose a mortgage upon premises erroneously described, the mortgagors' ownership of the premises intended to be mortgaged is sufficiently proved *prima facie* by evidence showing that the defendants were in possession of the property, exercising acts of ownership, renting and receiving rent therefor, insuring same in their own right as owners, and that they offered to convey the property to the mortgagee in consideration of a release of the mortgage and the payment of a small sum of money.

One whose title is adverse to and paramount to the mortgagor is not a necessary nor proper party to a foreclosure of the mortgage.

In an action to reform and foreclose a mortgage upon premises misdescribed therein, the plaintiff is not entitled to a decree, when he has, in consideration of a release of the mortgage, received a deed conveying the premises as erroneously described in the mortgage, and has failed to surrender the deed or to tender a reconveyance of the premises, as misdescribed therein.

Appeal from Superior Court, Lewis County.—Hon.
 M. T. CURRY, Judge *pro tem*. Reversed.

M. A. Langhorne, for appellants.

E. B. Preble, and *G. T. Swasey*, for respondents.

July, 1896.] Opinion of the Court—GORDON, J.

The opinion of the court was delivered by

GORDON, J.—Respondent instituted this action in the superior court for Lewis county to reform and foreclose a mortgage of real estate executed by the appellants (husband and wife) to respondent's assignors, securing an indebtedness aggregating \$678 and interest.

The complaint alleges that at the time said mortgage was executed both the defendants and the mortgagees intended that the same should include and describe the north half of lot 1, block 2, of the town of Winlock; "that in drawing said mortgage the description of the property recited therein and intended to be conveyed was erroneously mentioned as being in Pagett's addition to the town of Winlock, when in truth and in fact the property intended to be conveyed by said mortgage was situate and being in the original town of Winlock as hereinbefore described." Also, that the appellants, at the time of the execution of the mortgage, did not own any real estate in Pagett's Addition to the town of Winlock, and that at the time of the execution and delivery of the mortgage the appellants pointed out and designated to the mortgagees as the property mortgaged and intended to be mortgaged, the property first above described.

A demurrer was interposed to this complaint and overruled by the court. Thereafter appellants answered, denying all of the allegations of the complaint, and alleging affirmatively that they were not at the time of the execution of the mortgage in question the owners of any right, title or interest in or to the north half of lot 1 in block 2 of the *original town* of Winlock. Upon findings of fact and conclusions duly made and filed, a decree was entered in favor of the respondent, and the defendants have appealed.

1. The first error complained of is the ruling of the court upon the demurrer to the complaint. Appellants insist that the complaint is insufficient, in that it is not alleged that there was any fraud or misrepresentation upon the part of the defendants, and that there is no allegation in the complaint that there was any "mutual mistake." It is true that the authorities hold that "in this class of cases the facts must be distinctly and positively averred;" but we think that while the complaint does not in express words allege "mutual mistake," it does distinctly set up facts from which that conclusion is inevitable, and it expressly alleges that the mortgage was given upon, and intended to be a lien upon, the north half of lot 1, block 2, of the original town of Winlock, etc. We think that the complaint lacks no allegation essential to confer jurisdiction in equity.

2. It is next insisted that equity is powerless to reform the deed or contract of a married woman. While such is undoubtedly the rule in many jurisdictions, we do not think it prevails where, as in this state, the wife is under no legal disability to contract. *Stevens v. Holman*, 112 Cal. 345 (44 Pac. 670); *Hamar v. Medsker*, 60 Ind. 413; *Witherington v. Mason*, 86 Ala. 345 (11 Am. St. Rep. 41, 5 South. 679).

We think that our statute conclusively establishes this point against appellant's contention. Section 1410, Gen. Stat. (1 Hill's Code), is as follows: "Contracts may be made by a wife, and liabilities incurred, and the same may be enforced by or against her to the same extent and in the same manner as if she were unmarried."

3. The trial court found that the defendants were the "owners and in possession of said north half of lot 1, block 2," of the original plat, etc., at the time of

July, 1896.] Opinion of the Court—GORDON, J.

the execution of the mortgage. This finding was excepted to and it is contended that the evidence fails to support it. We have examined the record carefully, and think that the proof in support of the finding is sufficient, at least for the purposes of this case, and as against these defendants. Upon the part of the plaintiff, among other things, it was shown that the building (known as the post-office building) upon the property was insured by appellants in their own right as owners, for the sum of \$500; that they were in possession of the property and exercised all the acts of ownership and rented it and received rent therefor. It also appears from certain letters written by appellant Charles E. Leonard (the husband) and introduced by plaintiff, that appellants were seeking to effect a loan upon the property at a lower rate of interest than that expressed in the notes secured by respondent's mortgage, and that it was their intention to pay and discharge respondent's mortgage from the proceeds of such loan. In another of said letters (written prior to the commencement of this action) appellant suggested that they would convey this property (viz., the property which respondent seeks to make chargeable with the lien of the mortgage) to the respondent, in consideration of a release of the mortgage and the payment of a small sum of money. This proof was *prima facie* sufficient to establish ownership. Abbott's Trial Evidence, p. 692. On the part of the defendants it was shown by the auditor of the county that a deed was of record covering the land in question, executed to one Harrington, but no proof was made tracing the title through the grantor to the primary source. Nor was it shown that such grantor was in possession at the time of its execution, or that Harrington was ever at any time in possession.

4. It is further urged as ground for reversal that Harrington should have been made a party defendant. As already stated, the proof fails to show that Harrington or his grantor ever had possession of the premises, or that Harrington had a record title extending back to the primary source. Hence, in the light of the record, Harrington was not a necessary party and is neither concluded nor affected by this proceeding.

But, irrespective of this view of the question, there is still another reason for this conclusion. Appellants seek to place him in the position of a claimant under a title adverse to, and if valid paramount to, their own. Assuming him to be such, he was not a proper party.

"The only proper parties to a foreclosure suit are the mortgagor, the mortgagee and those who have acquired any interest from either of them subsequently to the mortgage." *California Safe Deposit & Trust Co. v. Cheney Electric Light Co.*, 12 Wash. 138 (40 Pac. 732).

The title to the premises can be more appropriately determined in another form of action.

5. The final contention is that there can be no recovery by plaintiff because it appears that prior to the commencement of the action the plaintiff had, in consideration of a deed of conveyance to the property actually described in the mortgage, surrendered and delivered to the appellants possession of the note and mortgage in question; and that neither at the trial nor prior thereto had the respondent offered to reconvey said premises to the appellants, or surrender conveyance thereof. The theory of respondent's counsel is that the consideration for which the note and mortgage were surrendered was an *actual conveyance* of title to the property which is sought to be sub-

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jected to the lien of the mortgage in this case, whereas the deed actually obtained, like the mortgage sought to be reformed, erroneously described the property as being in "Pagett's Addition." Appellants requested the lower court to find that they "were at the time of the execution of said mortgage and ever since have been the owners of the north half of lot 1, block 2, Pagett's First Addition to the town of Winlock;" which was refused by the court. While the evidence is not satisfactory in this connection, we think that, fairly considered, appellants were entitled to this finding, and we shall dispose of the case upon that assumption. It was the duty of the respondent to have tendered a deed of reconveyance of the identical property described in the deed to him, viz., lot 1, block 2, Pagett's Addition, prior to the commencement of his action; or, if the deed from appellants to him had not been recorded, then he should have returned said deed or offered to surrender it to appellants.

Upon the whole record we think that substantial justice will be subserved by remanding the cause and permitting the respondent to reconvey to appellants the premises described in their deed to him of date May 16, 1895, or to surrender the deed of conveyance so received by him if the same has not been recorded; and upon his complying herewith within the period of thirty days from the date of the receipt of the remittitur by the lower court and the payment of the costs of both courts, the decree appealed from will be affirmed; otherwise the same will be reversed and the action dismissed.

HOYT, C. J., and ANDERS and DUNBAR, JJ., concur.

15	14b
23	562
15	148
41	483

[No. 2106. Decided July 11, 1896.]

ISAAC OLESON, *Respondent*, v. BANK OF TACOMA *et al.*,
Appellants.

RECEIVERS—APPOINTMENT FOR INSOLVENT CORPORATION—ASSIGNMENT FOR BENEFIT OF CREDITORS—RIGHTS OF ASSIGNEE AS AGAINST RECEIVER.

The making of a general assignment of its property for the benefit of creditors by an insolvent corporation can have no effect upon the power of a court, under Code Proc., § 328, to appoint a receiver at the instance of a creditor of the corporation.

A deed of assignment by an insolvent corporation can be set aside by the court, upon the subsequent appointment of a receiver at the suit of a creditor of the corporation.

A receiver having been appointed for an insolvent corporation, he is entitled to the possession of all of the assets of the corporation, as against an assignee holding under a prior voluntary assignment executed by the corporation while insolvent.

Appeal from Superior Court, Pierce County.—HON. JOHN C. STALLCUP, Judge. Affirmed.

Crowley, Sullivan & Grosscup, and *Richard Saxe Jones*, for appellants.

A. N. Jordan, and *J. S. Whitehouse*, for respondent.

The opinion of the court was delivered by

Hoyt, C. J.—The Tacoma Trust & Savings Bank was a corporation doing business in the city of Tacoma. On the 25th day of May, 1894, it transferred, assigned, and delivered to the Bank of Tacoma, a corporation organized under the laws of the state of Washington, and doing business in said city, all of its assets, of whatever kind and description; and said Bank of Tacoma, in consideration of said transfer, assumed and agreed to pay all the debts and liabilities of said Tacoma Trust & Savings Bank. On the 17th day of

July, 1896.] Opinion of the Court — HORT, C. J.

August, 1895, said Bank of Tacoma executed a general assignment whereby it attempted to convey all of its property and assets to the defendant Edward S. Alexander as assignee for the benefit of creditors. Thereafter the plaintiff and respondent, Isaac Oleson, commenced this action, by which he sought to have a receiver appointed to take charge of the assets of these banks for the purpose of having them reduced to money, and ratably applied in discharge of the liabilities of said banks. One of the alleged grounds for the appointment of such receiver was the insolvency of the corporations. There were other grounds, growing out of the alleged fact that the assignment to said Alexander was fraudulent and void for various reasons connected with its execution, and the object for which it was executed. Upon the first ground it was claimed by the plaintiff that under our statute it was the duty of the court, at the instance of any creditor of a corporation, to appoint a receiver, whenever it was made to appear that such corporation was insolvent. On the other, it was claimed that the assignment to Alexander, having been made in fraud of the rights of creditors, could be set aside at the suit of any of such creditors, and that, on account of the fraudulent transfer of all of the assets of the banks, it was the duty of the court to appoint a receiver to close up their business in the interest of their creditors. The principal part of the argument has been devoted to questions growing out of the second claim above referred to. Counsel for appellants seem to have assumed, as a basis of their arguments, the fact that under the decisions of this court an insolvent corporation could make a common-law assignment, and the further fact that, such an assignment having been made, it could not be set aside, and the rights of

the assignee thereunder affected, excepting for some fraud in its execution, to which the assignee was a party, or by reason of the unfitness of such assignee, or some misbehavior on his part. If these claims of the appellants are sustained, it will become necessary for us to enter into a discussion of the questions elaborately argued by counsel for appellants, to the effect that the assignment was not made for the purpose of defrauding creditors, that the assignee was a proper person to close up the affairs of the bank, and that he had been guilty of no misconduct which would authorize the court to remove him. If, on the contrary, it be held either that an insolvent corporation cannot make a common-law assignment, or that such an assignment does not oust a court of equity of jurisdiction to close up the affairs of the corporation through the agency of a receiver, a discussion of the questions presented by these elaborate arguments will be unnecessary. That an insolvent corporation can make an assignment of all of its property, which might well be called a "common-law assignment," and which will have the effect of transferring to the assignee title to the property for certain purposes, has been repeatedly held by this court. See *Nyman v. Berry*, 3 Wash. 734 (29 Pac. 557); *Thompson v. Huron Lumber Co.*, 4 Wash. 600 (30 Pac. 741); *McKay v. Elwood*, 12 Wash. 579 (41 Pac. 919). But in none of these cases was the question presented as to the effect of such an assignment upon the powers of a court of equity to set it aside and appoint a receiver to take possession of all of the property of such corporation and close up its affairs. The most that can be said to have been decided by these cases is that such an assignment conveys the legal title of the property to the assignee, and that such title cannot be successfully

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attacked in an action at law, and can' be asserted against any one claiming adversely thereto, but nothing was said therein as to the effect of such an assignment upon the powers of a court of equity to take charge of the affairs of the corporation which had made such assignment. An examination of such cases will show that, while the right of an insolvent corporation to make what is called a "common-law assignment" is recognized, it was not the intention of the court to hold that such an assignment had all the force and effect of an assignment at common law. On the contrary, it clearly appears from what was said in one or all of these cases that the power of an insolvent corporation to make an assignment for the benefit of creditors was more or less restricted. The right to prefer a creditor was an incident of a common-law assignment, but a necessary inference from what was said in these cases was that such right must be denied to an insolvent corporation, and such denial was necessary to protect the rights of creditors in the property of an insolvent corporation as a trust fund for their benefit. It follows that, while it must be accepted as the established law of this state that an insolvent corporation can make an assignment which will be valid and binding until attacked by a creditor of the corporation, the effect of such assignment, when so attacked, is an open question, and must be decided under our statute upon principle and authority, unaided by any decision of this court.

Section 325 of the Code of Procedure provides that

"A receiver is a person appointed by a court or judicial officer to take charge of property during the pending of a civil action or proceeding, or upon a judgment, decree or order therein, and to manage and dispose of it as the court or officer may direct."

And § 326 provides that

“A receiver may be appointed by the court in the following cases: . . . (5) When a corporation has been dissolved or is insolvent, or is in imminent danger of insolvency, or has forfeited its corporate rights.”

Such being the provisions of our statute, it seems too clear for argument that the court of proper jurisdiction has a right to appoint a receiver, at the instance of any party interested, whenever it is made to appear to it that such corporation is insolvent, or has forfeited its corporate rights. No other conditions are imposed by the statute, and to import any other would be judicial legislation. Hence it must be held that it is the duty of the superior court of the proper county to appoint a receiver of an insolvent corporation whenever an interested party asks for such action on its part, and establishes the fact of such insolvency to the satisfaction of such court. The large number of cases cited by appellants upon the question as to when a receiver will be appointed were all decided under statutes unlike ours, and can furnish little aid in its construction. In fact, there is no room for construction. The statute is in express terms, and its language is capable of but one interpretation; and thereunder it must be held that a creditor has only to establish the fact that he is such, and that the corporation of which he is such creditor is insolvent, to make it the duty of the proper court to appoint a receiver to take possession of the property of such corporation and close up its affairs. Can a corporation, by its voluntary act in transferring to an assignee all the assets of such corporation, divest the court of the jurisdiction to close up its affairs? To hold that it can would do violence to the statutory provision above referred to. No exception to the power of the court is

July, 1896.] Opinion of the Court—Hoyt, C. J.

made by the statute, and no good reason can be given for importing one; for while it is true that an assignment by the corporation of all of its property for the benefit of its creditors, without preference, may be in furtherance of the same object which the court is seeking when it appoints a receiver for the purpose of winding up the affairs of an insolvent corporation, yet such object cannot be fully accomplished by such assignee unless his powers as such are enlarged. As a common law assignee, he could assert no rights which his assignor could not have asserted. Hence, if his powers be restricted to those under the assignment, construed as one at common law, he could reach no equitable asset of the corporation. It follows that the rights of creditors could only be fully protected by such assignee by his powers being so extended as to vest him, not only with the rights of his assignor but also of its creditors. But since he gets no rights to the property excepting by a purely legal instrument, the force of which at common law was well understood, it would be judicial construction, amounting substantially to legislation, to hold that the making of such assignment carried with it, not only the rights of the corporation which made it, but also of its creditors. But, if it be held that such an assignment cannot be set aside by a court of equity at the instance of a creditor, it must be held that the powers of the assignee are thus enlarged, or two administrations of the affairs of an insolvent corporation will become necessary,—one to enforce such claims as the corporation itself could have enforced, and apply the proceeds *pro rata* to the discharge of the claims of its creditors, and the other by a receiver to enforce those rights available only to creditors, and distribute their proceeds. Such dual administration would so add to

the expense of closing up the affairs of an insolvent corporation that some construction making it unnecessary should be adopted, if possible. Two only seem possible,—the one which enlarges the power of the assignee under such an assignment as above stated, or one which holds that such an assignment, though perfectly valid at law, is subject to be set aside by a court of equity at the instance of any creditor of the corporation. Of these two constructions, the last will best harmonize with the provisions of our statute. The right of a creditor to have a receiver appointed whenever a corporation becomes insolvent, having been expressly given by statute, must be protected; and such right having been protected, and such receiver having been appointed, the right of the court to set aside the deed of assignment can be upheld upon familiar principles. Such deed of assignment is a voluntary one, without any consideration moving from the assignee to the assignor, and, for want of such consideration, could be set aside as in fraud of the right of creditors, whether or not any fraud was intended.

Our statute requiring us to hold that a receiver must be appointed at the instance of a creditor of an insolvent corporation requires us to further hold that the object of such statute can only be fully accomplished by holding that, when such receiver is appointed, he is entitled to the possession of all of the assets of the corporation, the title to which has not been parted with by such corporation upon sufficient consideration moving to it at the time the instrument which purported to convey such assets was executed. Aside from the fact that such statute can only be made fully effective by this construction is the further consideration that the right of the court to appoint a receiver ought not to be taken away by the voluntary act of the insolvent

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Syllabus

corporation. If it could be, it would be within the power of every corporation, when it learned that proceedings were to be instituted for the appointment of a receiver, to defeat such appointment by making a voluntary assignment. We feel compelled to hold that the making of a general assignment of its property by an insolvent corporation can have no effect upon the power of the court to appoint a receiver at the instance of a creditor of the corporation.

Such being our conclusions as to the law of this case, but two questions of fact are presented which are material. One is as to whether or not the plaintiff was a creditor of the corporations for which the receiver was appointed, and the other is as to the insolvency of such corporations. As to both of these questions the superior court has made affirmative findings of fact, which are sufficiently supported by the evidence. It follows that the decree appealed from must be affirmed.

DUNBAR, ANDERS, GORDON and SCOTT, JJ., concur.

[No. 2121. Decided July 11, 1896.]

LOUIS URBAN *et al.*, *Appellants*, v. MARION HELMICK
et al., *Respondents*.

LIBEL—QUESTION OF LAW—CONSTRUCTION.

In civil actions, the question whether a publication constitutes libel is one of law to be determined by the court, where the language is unambiguous.

In determining whether the language is libelous, it must be given its ordinary meaning, and the meaning cannot be extended by *innuendo* beyond what the words justify in connection with the extrinsic facts.

It is not libelous *per se* to accuse some one of being deficient in

15	155
38	168

some quality which the law does not require him as a good citizen to possess.

A publication charging a hotel proprietor with being a "hog" for the reason that he would not trade at home and build up the home trade and town as much as possible, but sent to another city for supplies, because he wanted to make it all, is not libelous *per se*.

Appeal from Superior Court, Skagit County.—Hon. HENRY MCBRIDE, Judge. Affirmed.

Thomas B. Hardin, and *Pierre P. Ferry*, for appellants.

Sinclair & Smith, and *Robinson & Rowell*, for respondents.

The opinion of the court was delivered by

GORDON, J.—The appellants (plaintiffs in the court below) were at the time of the commencement of this action engaged in the hotel business at Sedro in Skagit county. The respondents, Lovett M. Wood and wife were the owners of the weekly newspaper known as "The Trade Register," published at the city of Seattle, of which newspaper said Lovett M. Wood was editor and publisher and the respondent Ackman was associate editor. This action was instituted in the superior court for Skagit county to recover damages which appellants alleged they sustained by reason of the publication in said newspaper of the following article, written by the respondent Helmick, viz.:

"LIVE AND LET LIVE.

"SEDRO, WN., Nov. 15, 1894.

"*Editor Trade Register*:

"I am a strong believer in the old saying 'live and let live,' but in some localities there are hogs, called business men, that want it all. I believe in buying at home and building up our own trade and town as

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much as possible, as the more business we do the more money there is circulated at home. We have a hotel here that does not believe in that kind of business and will not trade at home, but sends to Seattle for supplies. As this hotel gets most of its money from traveling salesmen who come to Sedro, I wish to say to them that I will not buy any goods of them or the house they represent if they stop at the Hotel Sedro from now on, or as long as they buy from Seattle or elsewhere. Neither will I buy from the Seattle house selling to them through some one else. When a business man will not trade at home he does not deserve the patronage of the traveling public.

“Respectfully yours,

“MARION HELMICK, Grocer.”

After setting out the article, the complaint, by way of innuendo, alleges that —

“Defendants meant to be understood and were understood by all of the friends, acquaintances and patrons of these plaintiffs and by the readers of said newspaper and by the public generally, to charge these plaintiffs as individuals and in the management of said hotel business with being ‘hogs,’ thereby meaning that these plaintiffs as individuals and in the management of said hotel business were possessed of and controlled and actuated by the low, dirty, groveling, grasping, gluttonous, self-seeking and selfish instincts and characteristics of hogs or swine, and were possessed of and actuated by all of the instincts and characteristics of hogs or swine; and that said letter . . . was . . . published by said defendants with the intent thereby to provoke these plaintiffs and each of them to wrath, and to expose these plaintiffs and each of them to public hatred, contempt and ridicule, and to deprive these plaintiffs and each of them of the benefit of public confidence and social intercourse, and to injure and destroy the business of these plaintiffs; . . . and the said letter and publication thereby tended to and did expose these plaintiffs and each of them to public hatred, contempt and ridicule, and tended to and did deprive

these plaintiffs and each of them of the benefits of public confidence and social intercourse, and did greatly injure these plaintiffs and their business That these plaintiffs, by the wrongful acts of the defendants aforesaid, etc., have been damaged in the sum of \$2,000."

Respondents separately demurred to the complaint upon the general ground of insufficiency. The demurrers having been sustained and appellants electing to stand upon their complaint, and refusing to amend, judgment was given dismissing the action, from which they have appealed. There are no allegations in the complaint alleging special damages, and it is the contention of the appellants that the writing is libelous *per se*. The rule is well settled in civil actions that where the language is unambiguous, the question of whether it constitutes libel becomes a question of law to be determined by the court. *Donaghue v. Gaffy*, 54 Conn. 257 (7 Atl. 552); *Moore v. Francis*, 121 N. Y. 199 (18 Am. St. Rep. 810, 23 N. E. 1127); Townshend, Slander and Libel (4th ed.), § 286. It is equally well settled that the language used must be given its ordinary meaning, and

"The plaintiff cannot, by innuendoes, extend the meaning beyond what the words justify in connection with the extrinsic facts. And when the innuendo is not justified by the antecedent facts referred to, so that without it the words are not actionable, a demurrer to the complaint will lie." 1 Boone, Code Pleading, § 163.

"The language is to be understood in the ordinary and most natural sense; and, when the writing complained of is plain and unambiguous, the question in a civil action, whether it is a libel or not, is a question of law." LACOMBE, Circuit Judge, in *Morgan v. Halberstadt*, 60 Fed. 592.

Interpreting the article in question in the light of

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the rule thus laid down we think that appellants' explanation of the meaning and effect of the article must be rejected. The article itself furnishes its own explanation of the meaning to be given to the word "hogs." That explanation and meaning is that they do "not believe in that kind of business (that is, in buying at home and building up our own trade and town as much as possible), and will not trade at home, but send to Seattle for supplies." This is certainly no reflection upon the character of their hotel or the kind of accommodation or refreshment which it affords. The article does not charge or impute anything immoral or criminal, nor is it calculated to expose the appellants to public hatred, contempt or ridicule, or to deprive them of the benefits of public confidence. Unquestionably appellants had the legal right to trade in Seattle or send there for supplies, if they deemed it to their advantage, and the publication is nothing more than "a hostile comment upon the manner in which the plaintiffs used within the pale of the law" their right to trade where and with whom they pleased. *Donaghue v. Gaffy, supra; Homer v. Engelhardt*, 117 Mass. 540.

To accuse one of being deficient in some quality which the law does not require him as a good citizen to possess is not libelous *per se*. The public may disapprove of appellants' conduct in thus exercising the right to trade outside of the town where they reside, but the publication does not expose them to public hatred or contempt in the sense or to the degree required by the law of libel.

It follows that the demurrers were properly sustained, and the judgment will be affirmed.

HOYT, C. J., and ANDERS, SCOTT and DUNBAR, JJ., concur.

[No. 2244. Decided July 13, 1896.]

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THE WASHINGTON NATIONAL BANK OF SEATTLE, *Respondent*, v. E. D. SMITH *et al.*, *Defendants*, JANE THOMSON, *Appellant*.

INSURANCE OF PROPERTY BY MORTGAGEE—FIXTURES—INTENTION OF ONE ATTACHING MACHINERY TO REALTY.

Where insurance has been effected upon mortgaged premises by the mortgagee, it must be presumed, in the absence of any communication of a contrary intent to the mortgagors, that it was so done in pursuance of a right reserved in the mortgage providing that the mortgagee might keep the property insured at the expense of the mortgagors, and that moneys paid for premiums should be a lien upon the mortgaged property and collected under the terms of the mortgage.

Where policies of insurance upon mortgaged property are taken out by a mortgagee in the name of the mortgagors, with a provision that the loss, if any, should be payable to the mortgagee as her interest might appear, the mortgagee cannot show by oral testimony that the contracts were not made by her as mortgagee but that the policies were taken out for her sole benefit and that the premiums paid were not intended to be charged against the mortgagors under the conditions of the mortgage authorizing her to insure, if the mortgagors failed to do so.

The intention to make machinery a permanent part of the building to which it is attached cannot be proved by testimony as to the actual state of mind of the person attaching it to the real estate at the time of its annexation, but must be gathered from circumstances surrounding the transaction, and from what was said and done at the time.

Appeal from Superior Court, King County.—Hon. RICHARD OSBORN, Judge. Affirmed.

Smith & Cole, for appellant:

The mortgagee's interest was insurable. *Gilman v. Dwelling House Ins. Co.*, 81 Me. 488; *Trade Ins. Co. v. Barrackliff*, 45 N. J. Law, 543 (46 Am. Rep. 792); 2 Beach, Insurance, § 864; *Hooper v. Robinson*, 98 U. S.

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Argument of Counsel.

528; *Sibley v. Prescott Ins. Co.*, 57 Mich. 14; *McDonald v. Black*, 20 Ohio, 185 (55 Am. Dec. 448); *Hancox v. Fishing Ins. Co.*, 3 Sumn. 132; *Strong v. Manufacturers' Ins. Co.*, 10 Pick. 40 (20 Am. Dec. 507); *Columbian Ins. Co. v. Lawrence*, 2 Pet. 25; *Merrett v. Farmers' Ins. Co.*, 42 Iowa, 13; *Williams v. Ins. Co.*, 107 Mass. 377; *Putnam v. Mercantile Ins. Co.*, 5 Metc. 386; *Eastern R. Co. v. Relief Ins. Co.*, 98 Mass. 420; *Springfield F. & M. Ins. Co. v. Allen*, 43 N. Y. 389 (3 Am. Rep. 711); *Herkimer v. Rice*, 27 N. Y. 163.

The benefits of the policies were hers alone. The mortgagee having a right, both under the terms of the mortgage and independently, to insure her interest, and having made the contract directly with the garnishees, the mortgagor can claim no benefit from such insurance. *Russell v. Southard*, 12 How. 157; *White v. Brown*, 2 Cush. 412; *Stinchfield v. Milliken*, 71 Me. 567; *Foster v. Van Reed*, 70 N. Y. 19 (26 Am. Rep. 544); *Excelsior Fire Ins. Co. v. Royal Ins. Co.*, 55 N. Y. 343 (14 Am. Rep. 271); *King v. State Mutual Fire Ins. Co.*, 7 Cush. 1 (54 Am. Dec. 683).

Boyer & Guie, and *Donworth & Howe*, for respondent :

The insurance, stipulated to be paid in case of loss, was made payable to Jane Thomson as her interest as mortgagee might appear. Inasmuch as she had no interest as mortgagee in property not covered by her mortgage, nothing was payable to her by the garnishee on account of the destruction of the personal property. 1 Wood, Insurance (2d ed.), p. 613; *Wilson v. Hill*, 3 Metc. (Mass.) 66; *Macomber v. Cambridge Mutual Fire Ins. Co.*, 8 Cush. 133; *Carter v. Humboldt Ins. Co.*, 12 Iowa, 287; *Rohrbach v. Germania Ins. Co.*, 62 N. Y. 47 (20 Am. Rep. 451); *Bates v. Equitable Ins. Co.*, 10 Wall. 33; *Manson v. Phoenix Ins. Co.*, 64 Wis.

26 (54 Am. Rep. 573); 1 Jones, Mortgages (4th ed.), § 396, 397. If Jane Thomson never had a lien upon the personal property she had no insurable interest in such property and cannot claim the insurance money due under the policy for the destruction of such personal property by fire, because her debt had no reference to the articles insured and no lien could be created on such articles by the mortgage debt. Porter, Insurance, *p. 71; *Kernochan v. N. Y. Bowery Fire Ins. Co.*, 17 N. Y. 428; *Manson v. Phoenix Ins. Co.*, 64 Wis. 26 (54 Am. Rep. 573).

"If there was any arrangement between mortgagor and mortgagee, whether verbal or written, by which the mortgagor becomes liable to pay for the insurance, he is entitled to the benefit thereof by having it applied in liquidation of the mortgage debt, *pro rata*, and the simple test of his right in this respect, is not whether he has paid for the insurance nor whether the mortgagee procured the insurance, intending to look to him for a re-imbursement of the premium, but whether he is liable to the mortgagee therefor, under any agreement express or implied." 2 Wood, Insurance (2d ed.) p. 1076; *Kernochan v. Ins. Co.*, *supra*; *Pendleton v. Elliott*, 35 N. W. 97; *Fowley v. Palmer*, 5 Gray, 549; *Cone v. Insurance Co.*, 60 N. Y. 619.

The opinion of the court was delivered by

HOYT, C. J.—The intervenor and appellant was the owner and holder of a certain mortgage made by the defendant E. D. Smith and Margaret B. Smith, his wife. This mortgage was in the usual form of a real estate mortgage and the property covered thereby was not so described as to include anything not a part of the real estate. Default having been made in the

conditions of the mortgage, appellant commenced proceedings to foreclose it, pending which she caused insurance policies to be issued upon the mill building situated on the land covered by the mortgage, and certain machinery situated therein. The property, including said machinery, was partially destroyed by fire and the amount of the loss under such policies of insurance adjusted. Thereafter the plaintiff caused the defendant insurance companies to be summoned as garnishees of the mortgagors and sought to secure the application of the money due therefrom to the payment of a judgment which it had against the mortgagors. The appellant was allowed to intervene in these garnishee proceedings, and thereafter such agreements and stipulations were entered into between all the parties that substantially the only question left for the determination of the court was as to whether the money to be paid for the partial destruction of certain machinery in the mill was the property of the mortgagors or of the mortgagee.

There was another question left open which appellant has suggested was so decided as to entitle her to a reversal of the judgment. This question grew out of the claim that it was not shown that a sufficient amount of the loss as adjusted was paid on account of the machinery, which it was claimed was personal property and not a part of the real estate, to pay the amount adjudged to be due the plaintiff. But under the stipulations of the parties and the circumstances surrounding the case at the time such stipulations were entered into we are satisfied that there is nothing in this claim, and it requires no further consideration at our hands.

The intervenor and appellant founds her right to the money to be paid by the insurance companies for

the partial destruction of the machinery in question upon two propositions. One, that the contracts of insurance were solely between herself and the insurance companies, and the mortgagors in no sense parties thereto nor interested therein; that for that reason any money to be paid upon such contracts would belong to her and not to the mortgagors. The policies were taken out in the name of E. D. Smith, one of the mortgagors, and, the other mortgagor being his wife, they must receive the same construction as they would if taken out in the names of both of the mortgagors. They were in the usual form of such contracts between an insurance company on the one part and the insured upon the other, and thereby such mortgagors were insured to a certain amount against damage by fire to the property in question. The only evidence of the interest of the mortgagee was a statement indorsed upon each of the policies, to the effect that the loss, if any, should be paid to the appellant mortgagee as her interest might appear. Under the terms of the mortgage it was the duty of the mortgagors to keep the buildings, situated upon the premises covered by the mortgage, insured in the sum of \$40,000, and thereunder it was the right of the mortgagee, if the mortgagors did not do this, to herself cause it to be done at the expense of the mortgagors, the re-payment of the premium paid by her for that purpose to be secured under the mortgage.

Such being the conditions of the mortgage, the reasonable and ordinary interpretation of the action of the appellant in taking out the policies of insurance would be that she was acting thereunder, and that the premium which she might have paid in so doing was or might have been charged to the mortgagors and collected in addition to the amount due

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under the terms of the mortgage. If this was the effect of her taking out the policies of insurance there would be no ground for the contention that she had any interest therein excepting as mortgagee of the property covered by the mortgage, and it would follow that if she had no interest in the machinery which was damaged, as mortgagee, she would have no interest in the moneys to be paid by the insurance companies on account of such damage. The policies of insurance under these circumstances would have been for the sole benefit of the mortgagors, excepting in so far as they were qualified by the statements indorsed thereon that the loss, if any, should be payable to the appellant mortgagee as her interest should appear, and if she had no interest as such mortgagee in the machinery damaged she would have no interest in the moneys to be paid under said policies on account of such damages.

But it is contended on the part of the appellants, and proof tending to establish such contention was introduced at the trial, that as a matter of fact the policies of insurance were not taken out under the conditions of the mortgage which authorized the mortgagee to keep the property insured if the mortgagors failed to do so; that, on the contrary, the policies were taken out for the sole benefit of the appellant; that the premium was paid by her and that she had not charged, nor did she at any time intend to charge, the same against the mortgagors to be collected under the provisions of the mortgage or otherwise. If, notwithstanding the conditions of the mortgage the mortgagee had the right to independently insure the property, and if the contracts of insurance which were issued by the companies could be construed as having been made exclusively for the benefit of the appellant

as mortgagee, there would be force in the contention that the mortgagors had no interest in the moneys to be paid by the insurance companies. But, in our opinion, the contracts of insurance cannot be so construed: first, because of the right of the mortgagee to keep the property insured at the expense of the mortgagors and to reimburse herself for any moneys which she might pay in so doing by having it declared a lien upon the mortgaged property and collected under the terms of the mortgage. She having reserved to herself this right, it will be presumed that she acted in pursuance thereof in taking out the insurance policies, and such presumption cannot be overcome by any intention on her part to effect the insurance in her own interest and independently of the provisions of the mortgage unless such intention had been at the time communicated to the mortgagors. Until such intention had been communicated to them they had a right to suppose that the insurance was effected under the provisions of the mortgage and that it was for their benefit, excepting that the loss under the contracts of insurance would be payable to the mortgagee if at the time of such loss she had any interest in the property on account of which any money should be paid. There was no proof that the intention, which it is claimed the mortgagee had, to insure exclusively for her own benefit was ever communicated to the mortgagors. Hence the court cannot now give effect to her intention so to do if it existed. Second, because the contracts of insurance evidenced by the policies are plain and unambiguous and have a certain legal construction, which under well settled rules cannot be changed by oral testimony.

Even if the claim of the appellant that it was in fact intended both by the insurance companies and

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by herself that the insurance should be for her exclusive benefit was clearly established, it would not thereby be shown that such a mistake had been made in the drafting of the contracts as to entitle her to introduce oral testimony as to such mistake. But there was no proof whatever that either of the insurance companies intended to issue a policy in other terms than those in which these policies were issued. On the contrary, it affirmatively appeared that it was the universal custom of insurance companies to insist upon this form of contract, even although the object to be secured was the protection of the interest of the mortgagee. That such was the rule was not disputed by either party, and the necessity for it was well illustrated by the argument of counsel in the case at bar.

Under the rule which formerly obtained, by which the mortgagee was allowed, in his own name, to insure the mortgaged property, it was impossible to prevent such property from being insured to an amount greatly exceeding its actual value. Hence, public policy as well as the interest of the insurance companies and of honest insurers demanded that some rule should be established by which the placing of excessive insurance might be avoided. The rule under consideration resulted from this state of facts and is one which should be enforced in the interest of the public and of the parties interested.

The other proposition is founded upon the claim that such machinery was a part of the real estate covered by the mortgage. As we have seen, the mortgage did not purport to cover anything but the real estate therein described. Hence, if the mortgagee had any interest in this machinery it was because of the fact that it was so related to the real estate as to

become a fixture so that a lien thereon passed to the mortgagee as a part of the real estate described in her mortgage. No general rule can be promulgated under which it can be determined whether a particular piece of machinery is or is not a fixture to the real estate with which it is used. So many considerations enter into the determination of this question that no general rule can be stated which will apply in all cases. Not only can no general rule be adduced from the decisions of the courts which will apply to all cases, but it will appear from an examination of the decisions upon this question that there is a great want of harmony even where the circumstances were identical. There is a class of cases which have adopted a rule which, if applied to the facts shown by the evidence to have existed as to the placing of this machinery in the mill building in which it was used, would require us to hold that such machinery was a fixture and passed to the mortgagee as a part of the real estate.

A leading case of this kind is *Ottumwa Woolen Mill Co. v. Hawley*, 44 Iowa, 57. But the learned court which decided it, though apparently well satisfied with the conclusion to which it had come, was forced to admit that a contrary doctrine had been established by the courts of a majority of the states which had passed upon the question. This machinery was attached to the building in substantially the same manner as was that in controversy in the case of *Chase v. Tacoma Box Co.*, 11 Wash. 377 (39 Pac. 639), and *Cherry v. Arthur*, 5 Wash. 787 (32 Pac. 744), and under the rule announced in those cases, which rule we believe to be supported by the weight of authority, it must be held to have been personal property and not such a fixture as to pass to the mortgagee. That the means by which this machinery was attached to the

real estate was substantially the same as that by which the machinery in question in those cases was so attached is substantially conceded by the appellant, but she contends that in the case at bars she proved, or offered to prove, that the intention of the mortgagors at the time the machinery was attached to the real estate was to make it a permanent fixture, and a part of such real estate. That the intention with which machinery is placed upon the real estate is one of the elements to be taken into consideration in determining whether or not it remains a chattel or becomes a part of such real estate is conceded, but it does not follow that such intention can be shown by testimony as to the actual state of the mind of the person who attached the machinery to the real estate at the time it was attached. On the contrary his intention must be gathered from circumstances surrounding the transaction and from what was said and done at the time, and cannot be affected by his state of mind retained as a secret. Beside, if we should adopt the theory of the appellant as to the force to be given to the intention existing in the mind at the time the machinery was attached we should not be so satisfied with the proof that it was intended to make the machinery in question a fixture as to be willing to reverse the judgment on that account. It is true that one of the mortgagors testified in general terms that he intended the machinery to be a permanent part of the building with which it was connected, but it was made to appear by uncontradicted testimony that at the time he put the machinery in the building he made a chattel mortgage thereon, and it must follow either that he supposed at the time that it was not so affixed to the real estate as to become a part thereof, or else he intended to deceive the party to whom he executed such chattel mortgage,

and it is more reasonable to presume that he acted honestly in the making of such mortgage than that he thereby intended to perpetrate a fraud. If the question as to the nature of this property had arisen between the mortgagee named in said chattel mortgage and the appellant, there could be no doubt but that under the rule heretofore announced by this court it would be held to be personal property, and in our opinion the rule was not changed by the fact that the question was raised between the parties to the real estate mortgage.

It follows from what we have said that in our opinion the material findings of fact made by the superior court were sustained by the proofs and that such findings must stand. It therefore becomes immaterial as to whether or not sufficient exceptions were taken to such findings. It is not claimed that the findings of fact do not support the judgment, and, such findings having been approved, the judgment must be affirmed.

ANDERS, SCOTT and GORDON, JJ., concur.

[No 2173. Decided July 18, 1896.]

E. M. BARRINGTON *et al.*, *Respondents*, v. COMMERCIAL DOCK COMPANY, *Appellant*.

WHARVES — PRIVATE OWNERSHIP — RIGHT OF PUBLIC TO USE.

A wharf belonging to an individual may from its use become in its nature a public wharf.

While Gen. Stat., § 2136, recognizes the right of private ownership in wharves, the section, as a whole cannot be construed to mean that such private property may not be devoted to such use as will, in contemplation of law, make it partake of the nature of a public wharf.

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Every vessel has a license to use, for her safety or convenience, any public wharf, on navigable waters, or any private wharf, which by the nature of its use, becomes affected with a public interest, upon the payment of reasonable wharfage charges.

Appeal from Superior Court, Pierce County.—Hon. WILLIAM H. PRITCHARD, Judge. Affirmed.

Murry & Scott, for appellant.

James F. McElroy, and *O'Brien & Robertson*, for respondents.

The opinion of the court was delivered by

GORDON, J.—Appellant is the owner and in possession of a wharf and warehouse situated upon a waterway known as the “city waterway” in the city of Tacoma, and located upon a portion of the tide lands which is not by the constitution and laws of the state reserved from sale. Said wharf and warehouse are not located at the terminus of any street in the city or any public highway in the county.

Appellant holds possession of that portion of tide lands upon which its wharf and warehouse are situated under and by virtue of a lease for the term of twenty years from the Tacoma Land Company. Said land company has the preference right to purchase the tide land on which the said wharf and warehouse are situated, and has made proper and timely application to the commissioner of public lands for that purpose.

The respondents are owners of the steamer “Cricket,” a passenger steamer plying between the cities of Tacoma and Seattle. They instituted this action in the superior court for Pierce county for the purpose of compelling the appellant to permit them to use appellant’s wharf as a landing place for the passengers and baggage carried on their steamer.

The answer of the appellant denied that it was conducting a public wharf and alleged that its wharf was a private one, and that respondents had no right to the use thereof as a landing place for passengers without appellant's permission, which permission it refused to give, alleging further that it had not sufficient room at its wharf to accommodate said steamer without discommoding its regular freight boats.

Upon final hearing the lower court entered a decree perpetually prohibiting and restraining appellant from interfering with or preventing respondents' steamer from landing and discharging its passengers and baggage at and over appellant's wharf upon the payment by respondents of a reasonable compensation for so doing. The defendant appeals.

In addition to what has been stated, the court found:

"That the said mentioned steamer Cricket at the date of the filing of this complaint, was landing at the docks of the defendant company, at the city of Tacoma, three times a day, and lying there during the night.

"That the dock of the said defendant is situated at and approached to by a bridge constructed from Pacific avenue in the city of Tacoma, to the rear of defendant's dock, which said bridge has been and is open and affords access to the public to the said dock, and that the said dock and the said bridge are not enclosed and that said bridge is in general use by the public as a thoroughfare, and that no restrictions or restraints are made in its use as such thoroughfare.

"That the said Commercial Dock Company transacts a general wharfinger and warehouse business at said dock in the city of Tacoma, and is suitable for the landing of vessels of the steamer Cricket's character, and *has ample and proper facilities* for the accommodation of the said steamer Cricket at the times and

under the circumstances that she now lands and seeks to land.

"That prior to the bringing of this action the defendant agreed with the plaintiffs to furnish a berth and dockage for the steamer Cricket for the landing of passengers at its dock at the city of Tacoma, Washington, for an indefinite time, for the sum of \$35 per month."

The court also found that on or about the 1st of October, 1895, appellant notified respondents that it had not sufficient room to accommodate respondents' steamer, and further, that if they continued to land said steamer at appellant's wharf after October 11th, "her lines would be thrown off or cut;" also found:

"That the said dock of the defendant corporation is located on the shore of Commencement Bay, in Pierce county, Washington, and the water at the outer edge of said dock is of a depth of eight feet at low tide, and the same is situated on a waterway approachable from the sea and the waters of Puget Sound.

"That vessels of a similar character and in competing business with the steamer Cricket, are permitted to land at the dock of the said defendant corporation."

Many of said findings were excepted to by appellant, but, after examining the evidence, we do not feel warranted in disturbing them.

The main contention of appellant is that its wharf is a private wharf, and under the control of the owner, and that it has a right to determine for itself with whom it will do business, and counsel confidently cites § 2136, Gen. Stat. (Vol. 1, Hill's Code), in support of this position. That section is as follows:

"Any person owning land adjoining any navigable waters or watercourse, within or bordering upon this state, may erect upon his own land any wharf or

wharves, and may extend them so far into said waters or watercourses as the convenience of shipping may require; and he may charge for wharfage such rates as shall be reasonable; *provided*, that he shall at all times leave sufficient room in the channel for the ordinary purposes of navigation."

The first part of this section confers a license upon the owner of lands adjoining navigable waters to extend any wharf erected upon his own land into said waters, but the latter part of the section, viz., that "he may charge for wharfage such rates as shall be reasonable," is a limitation merely. The section as a whole, while it recognizes the right of private ownership in wharves, cannot be construed to mean that such private property may not be devoted to such use as will, in contemplation of law, make it partake of the nature of a public wharf.

Upon this question it was said by the Supreme Court of the United States, in *Dutton v. Strong*, 1 Black, 32, that

"Piers or landing places, and even wharves, may be private, or they may be in their nature public, although the property may be in an individual owner; or, in other words, the owner may have the right to the exclusive enjoyment of the structure, and to exclude all other persons from its use; or he may be under obligation to concede to others the privilege of landing their goods, or of mooring their vessels there, upon the payment of a reasonable compensation as wharfage; and whether they are the one or the other may depend, in case of dispute, upon several considerations, *involving the purpose for which they were built, the uses to which they have been applied, the place where located, and the nature and character of the structure.*"

In Gould on Waters (2d ed.), § 119, the author lays

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down the proposition, and supports it by a great array of authorities, that

“When wharves belonging to individuals are legally thrown open to the use of the public, they become affected with a public interest, and the wharfage must be reasonable.”

The proof in this case shows that numerous steamers landed at appellant's wharf daily, discharging passengers and baggage as well as freight from different ports in the waters of Puget Sound and elsewhere, and it also shows that the appellant receives the sum of twenty-five cents per ton for every ton of freight going out or coming in over said wharf. We think that the language of the court in *Munn v. Illinois*, 94 U. S. 113, is applicable here, viz., that appellant “stands in the very gateway of commerce; and takes toll from all who pass.”

In re The Canal-boat Kate Tremaine, 5 Ben. 62, it is said :

“A wharf is a necessity of modern navigation, and of navigation alone. The sole object of its erection is to facilitate the transportation of passengers and freight upon navigable waters, . . . every vessel has a license to use, for her safety or convenience, any public wharf on navigable waters, upon paying reasonable wharfage.”

We think that in determining the character of appellant's wharf, regard should be had to the use to which it has been devoted rather than its private ownership, and that upon the facts found the position of the appellant cannot be maintained. As well might the proprietor of a stage coach claim the right to discriminate upon the ground that the property employed in his business was private property. The doctrine, if maintained, would tend to promote and

further monopolies, which it is not the policy of our law to favor.

The decree will be affirmed.

HOYT, C. J., and ANDERS, SCOTT and DUNBAR, JJ., concur.

15	176
16	293
15	176
20	251

15	176
38	503

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SYDNEY JOHN PEPPERALL, *an Infant, Respondent*, v.
THE CITY PARK TRANSIT COMPANY, *Appellant*.

ERRONEOUS INSTRUCTIONS — BINDING ON JURY — JUDGMENT — SPECIAL FINDINGS BY JURY.

Although an instruction to the jury may have been wrongfully given, it is binding and conclusive upon the jury. (DUNBAR and SCOTT, JJ., dissent.)

An erroneous instruction, when not complained of and excepted to, constitutes on appeal the law of the case, and the record will not be examined at the instance of the respondent for the purpose of determining wherein it is erroneous.

Where the special findings of the jury are inconsistent with the general verdict, the former controls the latter.

Appeal from Superior Court, Spokane County.—
Hon. JESSE ARTHUR, Judge. Reversed.

Graves, Wolf & Graves, for appellant:

Upon the point that the jury is not at liberty to disregard the instructions of the court, though erroneous, counsel cite, in addition to the authorities quoted from their brief in the majority opinion, the following cases, viz.: *Farley v. Budd*, 14 Iowa, 290; *Sullivan v. Otis*, 39 Iowa, 328.

Likewise, upon the point that special findings control, when inconsistent with the general verdict, counsel cite, Gen. Stat., § 276. *Stewart v. Walla Walla P. &*

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P. Co., 1 Wash. 521; *Leese v. Clark*, 20 Cal. 426; *McDermott v. Higby*, 23 Cal. 489; *Indianapolis, etc., R. R. Co. v. Stout*, 53 Ind. 148; *St. Louis, etc., Ry. Co.*, *v. Fudge*, 35 Am. & Eng. R. R. Cases, 246.

Dawson & Plattor, and *Fenton & Saunders*, for respondent:

Appellant is in error when it says the verdict must be right or wrong on the facts left to the jury. On the contrary, the verdict is right or wrong, on all of the facts that were submitted and those that should have been submitted to the jury. If the trial judge submits a question of law to the jury and they decide it rightly, there is no ground of exception. *Bernstein v. Humes*, 78 Ala. 134; *Thornburgh v. Mastin*, 93 N. C. 258; *Thompson, Trials*, § 1020; *Foll v. Muller*, 78 Ind. 507; *Krug v. Davis*, 101 Ind. 75; *Wallace v. Cravens*, 34 Ind. 534; *Whitworth v. Ballard*, 56 Ind. 279; *Elliott, Appellate Procedure*, § 590.

A special finding must be irreconcilably inconsistent with the general verdict, before the latter can be set aside and the former substituted in its place. *Amidon v. Gaff*, 24 Ind. 128; *Woollen v. Wishmier*, 70 Ind. 108; *Hardin v. Branner*, 25 Iowa, 364; *Gripton v. Thompson*, 32 Kan. 367; *Haas v. Chicago, etc., Ry. Co.*, 41 Wis. 44. The court will not strain the language of the special findings to override the general verdict. If possible, they will be interpreted so as to support the verdict rather than to overturn it. *Alhambra Water Co. v. Richardson*, 72 Cal. 598; *Solomon R. R. Co. v. Jones*, 34 Kan. 443. In construing the special findings, they are always considered as a whole, and one of the series cannot be singled out and that one alone used to overthrow the general verdict. *Strecker v. Conn*, 90 Ind. 469; *Thompson, Trials*, § 2695.

The opinion of the court was delivered by

GORDON, J.—The respondent, an infant, brought this action by his guardian *ad litem* to recover damages for personal injuries alleged to have been sustained in being run over by one of the cars of the appellant, a corporation operating an electric street railway in the city of Spokane. The complaint charges negligence upon the part of the appellant in that the car which ran over plaintiff was at the time operated "without the aid of a careful and competent conductor thereon;" also that it was operated and run "by an incompetent and negligent motorman in charge thereof, and with no other person or employee of said defendant, or any other persons in control or charge thereof;" that said motorman, "operated and ran said car at a high and reckless rate of speed;" and in that, "negligently failed and neglected to ring any bell or give any alarm whatever" to the plaintiff; that he "negligently failed to look ahead of said car and guard against running against and over" the said plaintiff; and that at the time the injuries complained of were sustained the car "was out of repair and defective so that the same could not be stopped or controlled by the brakes thereon."

The answer denies the main allegations of the complaint, and affirmatively alleges contributory negligence upon the part of the plaintiff and also upon the part of his father. Upon the trial, the court, among others, gave the following instructions to the jury:

"4. You are instructed that the complaint in this case charges negligence against the defendant in that *the motorman was incompetent, and in that there was no conductor or assistant to said motorman on the car, and in that the car was out of repair, and brakes out of order, and no bell upon it, and in that it was run at a high*

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and dangerous speed, and in that no bell or other warning was rung by the defendant attached to the car; and of these several allegations of negligence, you are instructed that there is no evidence before you which would permit you to consider the same, except the allegation as to the speed of the car, and as to the failure to ring the bell. You are therefore instructed not to consider any of the allegations of negligence in the complaint except these two."

The jury returned a general verdict in favor of plaintiff for the sum of \$2,500, and also returned certain special verdicts or findings, only six of which we deem it necessary to notice. They are as follows:

n. "(1.) At what rate per hour was the car of defendant running at the time it struck plaintiff? Nine miles.

"(2.) At what rate per hour would ordinarily and reasonably prudent men engaged in like business as the defendant run a car like that of the defendant, which caused the injury in question, at the time and place where defendant's car was being operated? Five miles per hour.

"(6.) Would the injury to plaintiff have occurred had said car been running at a rate of speed found by you in special verdict two? Yes.

"(21.) How far was the plaintiff from the track of defendant when the motorman first observed him, or by the use of reasonable care and prudence could first have observed him? Fifteen feet.

"(22.) How far was the plaintiff from defendant's car when the motorman in charge first saw him, or by the use of ordinary care and prudence could have seen him? Twelve feet.

"(23.) After the motorman first saw the plaintiff did he use reasonable prudence and care to stop the car? Yes."

Upon the reception of the general verdict and special findings the plaintiff moved for judgment upon the general verdict, and the defendant (appel-

lant here) moved the court for judgment upon the special findings notwithstanding the general verdict, upon the ground that the general verdict was inconsistent with the facts specially found, and that the facts so found by them entitled the defendant to judgment as matter of law. The appellant's motion for judgment upon the special findings was denied and exception taken. Respondent's motion for judgment upon the general verdict was granted, and the cause appealed.

It is the contention of the appellant that by the instruction above set out the court withdrew from the consideration of the jury all the allegations of negligence set out in the complaint excepting only that the car was run at a high and dangerous rate of speed and that no bell was rung or other warning given by the defendant of the approach of the car. It must be conceded that all other allegations of negligence contained in the complaint were by this instruction expressly withdrawn from the jury's consideration, but counsel for the respondent insists very strenuously that the court erred in giving this instruction, to which the appellant replies that whether the instruction in question was rightfully or wrongfully given, it was binding and conclusive upon the jury, and constitutes upon this hearing the law of the case, and with this latter insistment we agree. This court, upon appeal from a judgment in a particular case, can only consider errors complained of by the appellant, and in the absence of a cross-appeal cannot examine the record for the purpose of determining errors alleged by respondent.

Glenn v. Hill, 11 Wash 541 (40 Pac. 141), is in principle applicable here, as is also *Wilkinson v. Baxter's Estate*, 97 Mich. 536 (56 N. W. 931).

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But were we at liberty to go into the record for the purpose of determining whether there was evidence submitted in support of any of the other allegations of negligence charged in the complaint, and should conclude that the court erred in withdrawing the same from the consideration of the jury, it would avail the respondent nothing because the great weight of authority is to the effect that —

“A verdict of a jury, in disobedience to the instructions of the court, although the instruction itself was not correct in point of law, is a verdict ‘against law.’” *Emerson v. County of Santa Clara*, 40 Cal. 543; *Savery v. Busick*, 11 Iowa, 487; *Morss v. Johnson*, 38 Iowa, 430; *Union Pacific Ry. v. Hutchinson*, 40 Kan. 51 (19 Pac. 312); *Aguirre v. Alexander*, 58 Cal. 21; *Murray v. Heinze*, 17 Mont. 353 (42 Pac. 1057); *Hayward v. Ormsbee*, 7 Wis. 111; *Ryan v. Tudor*, 31 Kan. 366 (2 Pac. 797); *Irwin v. Thompson*, 27 Kans. 644, per BREWER, Justice.

In *Emerson v. County of Santa Clara*, *supra*, the court say :

“It matters not if the instruction disobeyed be itself erroneous in point of law; it is, nevertheless, binding upon the jury, who can no more be permitted to look beyond the instructions of the court to ascertain the law than they would be allowed to go outside of the evidence to find the facts of the case.

“ . . . The consequence of such a practice would be to fearfully impair the integrity of trials by jury. The question of law in theory supposed to have been settled by the court before the retirement of the jury, and upon the determination of which exceptions has been reserved, would not have been really determined at all (otherwise, at least, than as mere abstract propositions of law), for the jury would have the right, in their retirement, to review the opinion of the court, and disregard his instructions, when they did not accord with their own notions of the law of the case, the law while thus appearing to have been settled by the court in a particular way, would, in

reality, have been determined by the jury in exactly the opposite way, and while the court would read the verdict as the finding of fact, arrived at by applying the law as the court had announced it, the verdict would, in reality, be but a reversal by the jury of the rulings of the court, for the errors in point of law, which the jury were of opinion that the court had committed. Such a practice should not, in my opinion, be countenanced here by an inquiry as to whether the below court or the jury was mistaken in point of law in the particular case."

In *Savery v. Busick*, *supra*, the court say :

"Whatever may be our view of the law of this case, it is impossible for us to express it, or consider the questions presented, without going behind the action of the jury in trampling upon the authority of the court, and thereby giving some countenance to their assumption. This we are unwilling to do even by the slightest implication.

"It is no more competent for the jury to usurp the powers of the court, than it is for the court to interfere with their province in the ascertainment of facts. And when the jury, in this case, arrogated to themselves the right to determine the law in direct opposition to the instructions given them by the court, they were guilty of a flagrant abuse of their duties and obligations; and we will not review this case until it is tried upon the law as it shall be expounded by the court and not by the jury."

In *Union Pacific Ry. v. Hutchinson*, *supra*, the supreme court of Kansas say:

"Whether the instruction is correct or not, is immaterial. It was the law of the case, by which the jury should have been guided. . . . It was the duty of the jury to obey implicitly the instructions of the trial court, and, having found a state of facts by their answers to the interrogatories constituting contributory negligence on the part of the injured party, and releasing the railway company from liability,

their verdict should have followed their findings of fact."

Aside from the general rule, our constitution provides (art. 4, § 16), that trial judges "shall declare the law." It is the duty of the court in all cases to decide questions of law arising upon the trial, and it frequently becomes a question of law for the court to determine whether, in a given case, there is any evidence to be submitted to the jury in support of an issue raised by the pleadings.

From the special findings above set out we think it clearly appears that the injury complained of by respondent was not occasioned by any negligence of the appellant in running its car at a high rate of speed or in failing to ring the bell or sound the gong, and inasmuch as the jury were restricted by the instruction of the court to the consideration of the evidence bearing upon these allegations of negligence, their general verdict should have been in accordance with such special findings, and where the special findings of the jury are inconsistent with the general verdict, the former controls the latter. *Lake Shore, etc., Ry. Co. v. McCormick*, 74 Ind. 440; *Vaughn v. California Central Ry. Co.*, 83 Cal. 18 (23 Pac. 215); *Felton v. Chicago, etc., Ry. Co.*, 27 Am. & Eng. R. R. Cases, 229 (29 N. W. 618).

Reversed and remanded.

HOYT, C. J., and ANDERS, J., concur.

DUNBAR, J. (*dissenting*).—I dissent. I am forced to confess that the authorities are divided upon the main proposition discussed in the opinion, and indeed it seems that, from such investigation as I have been able to make, the weight of authority sustains the majority decision, although there are some cases, and comparatively recent ones too, which take the

other view. If, however, the authorities were uniform in holding that where a jury decides a question of law rightly, which had been submitted to them erroneously by the court, such rightful decision would be ground of error, I could not give my assent to such doctrine; because it seems to me to be absurd and opposed to the plainest principles of common sense. The only object of an appeal to this court is to enable the court to determine whether a fair trial has been accorded to the litigants below. How can it be said that an error of law has been committed, if the jury has decided the law correctly, notwithstanding the fact that it is the duty of the court to instruct the jury as to what the law is? The essential thing is that the case should be decided under the law, and if the jury decides it under the law which this court deems to be correct, then the object of the law is met. If the court had instructed the jury, as we will presume for the purposes of this case that it did, erroneously, and the jury had followed the instructions of the court, the verdict must necessarily have been erroneous and the case would have been reversed on appeal to this court. The respondent could not have corrected it below nor taken any exceptions to it, because it was in his favor.

It is true that, under the theory of the law generally, and under the rule laid down by our constitution in particular, the trial judges shall declare the law. The language of the constitution is "declare the law." But it presumes that the law shall be correctly declared, or, in other words, that the *law* shall be declared, and not something which is not the law, or which this court finds not to be the law. It has been the uniform announcement by this court that, where error was committed by the court in its instructions to

the jury, if it affirmatively appeared that no other verdict could have been rendered under the law and the facts than the verdict which was rendered by the jury under the erroneous instructions, such error would be error without prejudice and would not warrant a reversal of the cause. Nay, it has often been held that, where misconduct of the jury was proven and yet it conclusively appeared that such misconduct was not responsible for the verdict or that the verdict could not under the law and the testimony have been otherwise, such misconduct would not be error. Then, under what theory can it be held that the misconduct of the jury in a case of this kind—and I will concede it to be misconduct, and further concede that it was the duty of the jury to receive the instructions of the court as the law of the case—can be reversible error? When the case, for this alleged error, is reversed and sent back for trial, all that can be done eventually, if the case is correctly decided, is to affirm the verdict of the jury already rendered, and it simply puts the litigants to the useless expense of another trial. The logic of this kind of a ruling is that the verdict and judgment in favor of the respondent should be set aside because it does not follow the instructions of the court; and if the jury had followed the instructions of the court the judgment must necessarily have been set aside because the verdict was rendered under an erroneous instruction by the court. It seems to me too plain for argument that, where the judgment was rendered by the jury under the law, the object of the law has been attained and the parties should not be subjected to the expense and delay of another trial.

The judgment in my opinion should be affirmed.

SCOTT, J., concurs in dissenting opinion.

[No. 2143. Decided July 23, 1896.]

A. POTTER, *Respondent*, v. A. L. BLACK *et al.*, *Appellants*.

MUNICIPAL CORPORATIONS — POWER TO PURCHASE LAND AT TAX SALE — ASSESSMENTS — WHEN DELINQUENT — PAYMENT OF WARRANTS — CONSOLIDATED CITIES — LIABILITY FOR DEBTS OF FORMER CORPORATIONS.

The city of Whatcom had power to purchase land at a sale for delinquent street improvement assessments, under the provisions of its charter (Laws 1883, p. 150) which authorizes a purchase by the city treasurer for the city of such town lots and lands as cannot be sold for the amount of taxes, interest and charges thereon, when offered for public sale.

Under the provisions of the charter of the city of Whatcom (Laws 1885-6, p. 430, §§ 9, 10), providing that after the council shall have approved of an assessment for a street improvement, "they shall by ordinance establish the same and require the payment of said assessment within thirty days," and that upon complaint of any person aggrieved, within thirty days from the first publication of notice of the assessment, the council may amend same as to them may seem just, the action of the council in granting a rebate of a portion of such assessment more than three months subsequent to the passage of an ordinance establishing the assessment is unwarranted, though the council may not by resolution have declared the assessment delinquent until after such attempted rebate.

The treasurer of a city may be required to pay moneys in the treasury in a special fund upon warrants drawn thereon, although there may not be enough money therein to pay the face of the warrant, with the interest thereon.

The act of March 21, 1895 (Laws, p. 379), providing that the treasurer of a city shall issue a call for warrants whenever he has \$500 on hand, except in cases where the oldest outstanding warrant, with interest, exceeds the sum of \$500, in which case he shall wait until funds sufficient accumulate, does not apply to warrants drawn against a special fund, which fund cannot be devoted to any other purpose.

Where a consolidation of two cities has been effected under the provisions of Gen. Stat., §§ 497, 502, such consolidated city may be required to set apart from its current revenues a sufficient amount to liquidate certain warrants issued against a particular fund of one of the former corporations.

July, 1896.] Opinion of the Court — GORDON, J.

Appeal from Superior Court, Whatcom County.—
Hon. JOHN R. WINN, Judge. Affirmed.

John H. Sargent, and *Phil Gallaher*, for appellants.
D. W. Freeman, and *S. A. Callvert*, for respondent.

The opinion of the court was delivered by

GORDON, J.—Respondent is the owner and holder of street improvement warrants of the city of New Whatcom, numbered from 27 to 32, inclusive, each in the sum of \$500, four of which bear date September 3, 1890, and were on that day presented for payment to the treasurer of the city and indorsed “not paid for want of funds.” The remaining two bear date September 24, 1890, and were in like manner presented and indorsed on September 25. Each of said warrants is in the following form:

“No. 27. Street Improvement Warrant. \$500. Assessment District No. 31, G. Street, Whatcom, Wash., Sep. 3rd., 1890.

Treasurer of the City of Whatcom: Pay to McCaskill & Singleton, or order, the sum of Five Hundred Dollars out of Street Improvement Funds, District No. 31, under Ordinance No. 121, not otherwise appropriated.

W. M. LEACH, City Clerk.

W. J. PRATT, Mayor.”

(Seal of City of Whatcom).

Endorsed as follows: “Presented for payment Sep. 3rd., 1890, and not paid for want of funds.

MORRIS McCARTY, City Treasurer.

McCASKILL & SINGLETON, per Mc.”

Upon application of the respondent an alternative writ of mandate was issued in the lower court requiring the appellants,—the mayor, treasurer, and city council of the city of New Whatcom to apply on account of said warrants such sums of money in the

street improvement fund, district No. 31, then in the hands of the treasurer; also "that you do apply the moneys received by you from time to time, in the said "street improvement fund, district No. 31," as the same are received, immediately upon said warrants No. 27, 28, 29, 30, 31 and 32, as aforesaid, until the whole amount thereof, including interest at the rate of ten per cent per annum from the date of the presentation of said warrants to the city treasurer for payment . . . shall have been fully paid and discharged, or that you show cause," etc. The alternative writ recited, among other things, that for the purpose of paying for the improvement on G street, the city of Whatcom, under Ordinance No. 121, levied an assessment upon the property benefited by said improvement in the amount of \$17,380.58; that all sums unpaid on said assessment became delinquent June 20, 1890, and that the property on which said assessment was delinquent was offered for sale on November 22, 1890, in the manner provided by law; that at such sale the city of Whatcom was a bidder thereat, and bid off in its name and became the purchaser of said delinquent property to the amount of \$2,787.70; that all of said assessment for the improvement of G street, except the sums so levied upon the property so purchased by the city of Whatcom, has been paid into the treasury of said city to the credit of Improvement Fund, District No. 31; that said city of Whatcom became a part of the city of New Whatcom, by virtue of the consolidation of the city of Whatcom with the city of New Whatcom, under the name of the city of New Whatcom on the 16th day of February, 1891; that the property so purchased at such sale for delinquent assessments became the property of the city of New Whatcom, and that the same, with

July, 1896.

Opinion of the Court—GORDON, J.

the exception of certain lots which have been redeemed from said sale, on which the assessment amounts to \$917.60 is still the property of said city and forms a part of its assets; that said last mentioned city and the city of New Whatcom have each neglected and failed to reimburse said fund to the amount due and owing upon said property so bid off and purchased by the city of Whatcom; that there is due and owing said Street Improvement fund, District No. 31, from the city of New Whatcom \$2,004.10, with interest from November 22, 1890; that the city council of the city of Whatcom and New Whatcom has at various times since said assessment was levied, granted rebates of the taxes assessed and levied against certain pieces of property abutting said improvement amounting to \$475.51, and that in justice to respondent as holder of the aforesaid warrants, the appellant should reimburse said special fund to the amount of such rebates; that the city council has refused to make any provision for the payment of the aforesaid warrants although demanded so to do; further, that the treasurer of the city of New Whatcom has in his hands \$629.49 belonging to the "Street Improvement Fund, District No. 31," which he refuses to apply towards the payment of respondent's warrants; that respondent's warrants are the oldest outstanding warrants against said fund; and that all warrants drawn thereon prior to the issuing of respondent's warrants have been paid.

Appellants made answer to the alternative writ in which they denied that the assessment became delinquent June 20, 1890, denied that the city of Whatcom became a bidder or purchaser of real estate at said sale, and denied that the city of New Whatcom is owing the "Street Improvement Fund" any sum

whatever; also denied that any rebate to property owners in said district was allowed subsequent to the date when the assessment was declared delinquent by the city council of the city of Whatcom.

A jury having been expressly waived, the trial court, having made its findings of fact and conclusions of law, entered judgment in favor of respondent, awarding a peremptory writ. This appeal is from said judgment.

It is stated in appellants' brief that "there are but four main propositions for the court to pass upon in a decision in this case."

"1st. Had the city of Whatcom power under its charter and the laws of the state of Washington to purchase land at a sale for delinquent street grade taxes, and if so, did said city purchase any land at the sale of November 22nd, 1890, for the city of Whatcom as set out in the sixth paragraph of the findings of the court?"

"2nd. Did the city of Whatcom make any rebate of taxes to the property holders in assessment district No. 31, after the date on which said assessment became delinquent?"

"3rd. Can the city treasurer be compelled to pay a part of a warrant drawn against a particular street fund when he has not money enough in his hands to pay the whole of it?"

"4th. Can a consolidated city be compelled to set apart from its current revenues a sufficient amount to liquidate certain warrants that were issued against a particular fund of one of the former corporations?"

1. Answering the first question embraced in proposition one, we think the city of Whatcom had power under its charter to purchase land at a sale for delinquent street taxes; that power was conferred by § 9 of its charter, which reads:

"When any land or town lots cannot be sold for the

July, 1896.] Opinion of the Court—GORDON, J.

amount of taxes, interest and charges thereon, such lands or town lots shall be passed over and re-offered for sale before the close of the sale, and if the same cannot then be sold for the amount, such lands or town lots shall be purchased by the city treasurer, for the amount due thereon, for the city." Laws 1883, p. 150.

We also think that the lower court correctly found :

"That the property on which such assessment was delinquent, was offered for sale by the city marshal of said city of Whatcom, on the 22nd day of November, 1890, (and that at such sale, the city of Whatcom became and was, a bidder thereat, and bid off in its name certain real estate, on which such assessment was delinquent, to the amount of \$2,787.70.)"

2. In order to answer the second question involved in this case it becomes necessary to determine the date on which the assessment upon the property lying in the assessment district became delinquent. It appears from the record that Ordinance No. 121 authorizing this levy was adopted on May 20, 1890. Section 10 of the act of February 3, 1886, entitled "An act to amend an act entitled an act to incorporate the city of Whatcom," (Laws 1885-6, p. 430), provides that after the council shall have approved of the assessment and apportioned the cost of the improvement "they shall by ordinance establish the same and *require the payment of said assessment within thirty days,*" etc., and § 9 of the same act provides that "Any person considering himself aggrieved by such appraisement and assessment, may apply to the city council at any time within thirty days from the first publication of said notice, for a modification of said assessment, and the council may amend the same as to them may seem just."

It also appears that no application was made for

any modification of the assessment as established by said Ordinance No. 121 until September 9, 1890, on which date the record shows that a reduction was made in the assessment of certain property lying within the said assessment district, amounting to \$475.51. It is true, as claimed by counsel for the appellants that the city council on September 16, 1890, declared the assessment delinquent, and that the reduction had been made as a matter of fact one week prior thereto, but we think that under the charter provisions above set out the assessment had in fact become delinquent long prior to the resolution of the council to that effect, and that the action of the council on September 9, 1890, which professed to grant said rebates was without jurisdiction and unauthorized, and "in violation of its duty to the holders of said warrants."

3. Appellants contend that the treasurer "is not compelled to pay and need not make a call for outstanding warrants which exceed the sum of \$500 unless he has sufficient money on hand to pay the face of the warrant, together with all interest thereon." This contention is based upon section one of the act of March 21, 1895 (Laws, p. 379), relating to the payment of warrants, but we are disposed to agree with the claim of the respondent that this law is not applicable to warrants of the character of respondent's, which are drawn against a special fund, which fund cannot be devoted to any other purpose, and there is neither force nor reason which would require that this money—amounting to over \$600,—should be retained in its treasury to the credit of said fund while there were warrants outstanding bearing a high rate of interest. *Soule v. Seattle*, 6 Wash. 323 (33 Pac. 384, 1080).

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4. Section 502, Gen. Stat. (Vol. 1, Hill's Code), provides the manner in which "two or more contiguous municipal corporations may become consolidated into one corporation," and further provides that: "All the provisions of §§ 497 . . . of this volume of General Statutes shall apply to such corporation, and to the officers thereof." This last mentioned section provides that—

"Any city or town organized under the provisions . . . shall . . . be deemed and taken to be in law the identical corporation theretofore incorporated and existing, and such reorganization shall in nowise affect or impair . . . any debts, demands, liabilities, or obligations existing in favor or against such corporation," etc.

The provisions of these two sections make it plain that the city of New Whatcom is liable on account of the warrants in question to the same extent, and in the same degree, that the city of Whatcom was, or would be, had no consolidation been effected.

We do not feel called upon to notice the other propositions suggested in appellants' brief; they are formal objections to the writ and judgment. We think they are without merit, but, in any event, they do not present any question considered by the lower court, and for this reason cannot be considered here.

No error being apparent of record, the judgment will be affirmed.

ANDERS and DUNBAR, JJ., concur.

15	194
130	127
120	416
15	194
123	789
15	194
124	7

[No. 2215. Decided July 23, 1896.]

WALTER H. SODERBERG, *Appellant*, v. KING COUNTY,
in the State of Washington, *Respondent*.

MORTGAGE FORECLOSURE SALE—SHERIFF'S COMMISSION—WHEN SURPLUS—PAYMENT BY SHERIFF TO COUNTY—RIGHT OF JUDGMENT DEBTOR TO RECOVER—ASSUMPSIT.

A sheriff is not entitled to a commission upon the sale of mortgaged premises under a decree of foreclosure, where the property was bid in by the plaintiff for the amount of the mortgage debt, although the officer and the purchaser may have intended that a portion of the sum bid should be in payment of a commission demanded by the officer.

Where the sheriff upon making a foreclosure sale has been paid by the bidder, who was the plaintiff in the action, a certain sum as commission, such sum constitutes a surplus in the hands of the sheriff, which it is his duty to pay over to the judgment debtor.

Assumpsit will lie against a county for the recovery of sums charged by the sheriff as commissions upon foreclosure sales and by him mistakenly paid into the treasury, when such sums constitute a surplus in his hands to which the judgment debtor is entitled.

Want of privity between the parties is no obstacle to an action for money had and received.

A payment by the sheriff into the county treasury of a surplus arising from a foreclosure sale, made without the knowledge or consent of the judgment debtor, cannot be considered as a voluntary payment by the latter.

Appeal from Superior Court, King County.—Hon. RICHARD OSBORN, Judge. Reversed.

Lindsay, King & Turner, for appellant.

A. W. Hastie, and *W. W. Wilshire*, for respondent.

The opinion of the court was delivered by

GORDON, J.—Appeal from judgment of the superior court of King county in favor of defendant. This action was brought by plaintiff, as assignee of divers

July, 1896.] Opining of the Court — Gordon, J.

persons, judgment debtors in various foreclosure proceedings, claiming to be entitled to a surplus arising upon each of such foreclosure sales. There are thirty-five separate and independent causes of action, all based upon similar facts, and governed by a common rule of law. The aggregate amount claimed is \$2,004.84. There was no redemption in any case, and the plaintiff in each of the foreclosure actions became the purchaser. From the record it appears that the amount claimed as surplus in each case was the sum claimed by the sheriff as fees and commission in conducting the sale, and that the sheriff thereafter paid into the treasury of the respondent county the several amounts, under the mistaken belief that it was his duty to deduct a commission from the amount bid in the respective cases, and turn the amount so collected or deducted into the county treasury, as he is by law required to in all cases where fees as compensation for official services are received by him.

Two principal defenses are urged: First, that the sums claimed by plaintiff were not surplus, to which the plaintiff's assignors were entitled, but constituted a fee or commission which the officer making the sale claimed the right to charge, and which the purchaser at the sale knowingly paid to such officer as a commission charge on said sale; and that "neither the appellant nor his assignors had or has any interest in or concern with the money or transaction, but the same is a matter between the purchaser and the sheriff." The second ground of defense is:

"That the sheriff's payment to the county of this indebtedness due from him to either the county or the appellant's assignors was voluntary, with full knowledge of all the facts, under a claim of the county to payment in its own right, and not in any wise as the

agent of or pretending to be authorized to receive the same for or on behalf of appellant's assignors; that the county claimed said payment as creditor of the sheriff on account of his liability to the county for all fees and commissions received by him; that the sheriff was indebted for the amounts herein claimed as surplus, either to the county as for commissions, or to the respective judgment debtors as for surplus; and that his payment of this indebtedness to the county, an independent claimant, in preference of the respective judgment debtors, also independent claimants, does not invest appellant, as assignee of said judgment debtors, with a right of action against respondent for the amounts of these payments, upon a money demand, as for money had and received or otherwise, although it may be true that of right the sheriff should have made such payments to appellant's assignor."

It becomes necessary to ascertain whether appellant's assignors were entitled to the respective sums claimed from the sheriff conducting the sales. Counsel for respondent do not seriously contend that they were not, and this court held in *State, ex rel. Thompson, v. Prince*, 9 Wash. 107 (37 Pac. 291), that a sheriff was not entitled to a commission upon the sale of mortgaged premises under a decree of foreclosure where the property was bid in by the plaintiff for the amount of the mortgage debt. It matters not that the officer believed that he was by law entitled to and required to retain a commission upon such sale, and that this opinion was concurred in by the bidder, because, in contemplation of the law, the property is sold for the highest sum bid, and the law makes the application of the purchase price. To give effect to what is asserted to have been the intention of the purchaser, viz., that a portion of the sum bid by him was in payment of a commission which the sheriff conducting the sale demanded, and which the bidder supposed he had a

right to demand, would be, in effect, to give such purchaser a preference at the sale, and would be to permit the bidder and the officer to control and apply the proceeds of the sale. He bids a lump sum for the property, not a certain sum for the land, and an additional sum as and for costs and commission. The reasons which induced him to make the bid are quite immaterial, and cannot be inquired into. He is conclusively presumed to know the law. Were the rule otherwise, how could it be ascertained that the actual purchaser was the highest bidder? The amount claimed by appellant as a surplus in one of these causes of action is about \$500. The logic of respondent's position is that the purchase price in that case was theoretically \$500 less than the amount actually bid. Who can say that this \$500 might not have deterred some other bidder, who likewise would be presumed to know the law, but might well be ignorant of what was really intended by the rival bidder? There is one sufficient answer to this. That is that the judgment debtor is entitled to an accounting for the sum actually bid as the purchase price of the property sold, and that the law directs how the purchase price shall be applied. Therefore it is not competent to inquire the reasons which may have actuated the purchaser in making his bid. It cannot be told that he would have received the property had his bid been less than it actually was. Suppose that the judgment debtor had availed himself of his statutory right to redeem from the sale; is it not clear that he would have been obliged to pay the amount for which the property was sold as returned by the sheriff, including the very sum which is here termed a "commission," wrongfully but mistakenly claimed by the sheriff, and voluntarily paid by the purchaser? Our conclusion is that the sum

claimed constituted a surplus in the hands of the sheriff, which it was his duty to have paid to the judgment debtor. *Wilkinson v. Baxter's Estate*, 97 Mich. 536 (56 N. W. 931); *Mitchell v. Weaver*, 118 Ind. 55 (10 Am. St. Rep. 104, 20 N. E. 525).

2. The remaining question is, will assumpsit lie against the county for the recovery of such surplus which the sheriff has wrongfully and mistakenly paid into its treasury? Counsel for the respondent insist that the county stands in the position of an independent and adverse claimant, and that it only received from the sheriff payment of a claim alleged upon its part, and that payment by the sheriff "upon its independent claim does not discharge the sheriff from such indebtedness if, as a matter of right, appellant's assignors were entitled to have it paid to them by the sheriff." It is not pretended that the respondent has any valid or legal right to the moneys in controversy. It received the moneys of plaintiff's assignors without right or consideration, and it would be inequitable for it to retain the sums so received. Under such circumstances, the law implies a promise of restitution for the benefit of the rightful owner. As was said by Judge FIELD in *Pimental v. City of San Francisco*, 21 Cal. 352:

"If the city obtain the money of another by mistake, or without authority of law, it is her duty to refund it. . . . If she obtain other property, which does not belong to her, it is her duty to restore it, or, if used, to render an equivalent therefor. . . . The legal liability springs from the moral duty to make restitution. And we do not appreciate the morality which denies in such cases any rights to the individual whose money or other property has been thus appropriated. The law countenances no such wretched ethics; its command always is to do justice."

Nor can plaintiff's right of action be defeated upon the ground of "voluntary payment" made to respondent by the sheriff. As regards the plaintiff or his assignors, the payment is not to be considered a voluntary payment. It was made without their knowledge or consent.

But it is insisted that there is no privity between the plaintiff or his assignors and the respondent respecting the transaction. It is well settled that

"An action for money had and received lies against any one who has money in his hands which he is not entitled to hold as against the plaintiff, and want of privity between the parties is no obstacle to the action." *Bank of Metropolis v. First Nat. Bank of Jersey City*, 19 Fed. 301.

In *Bayne v. United States*, 93 U. S. 642, the supreme court of the United States say :

"Assumpsit will lie whenever the defendant has received money which is the property of the plaintiff, and which the defendant is obliged by natural justice and equity to refund."

A well-considered case, which involved this very question, is that of *State v. Village of St. Johnsbury*, 59 Vt. 332 (10 Atl. 531, 533). In the course of the opinion in that case, this language appears :

"But it is said that assumpsit for money had and received will not lie, for that there is no privity between the state and the village, as the latter received from third persons, and has retained the money in good faith, under an adverse claim of right and ownership. But, in order to maintain this action, there need be no privity between the parties, nor any promise to pay, other than what arises and is implied from the fact that the defendant has money in his hands belonging to the plaintiff, that he has no right conscientiously to retain. In such case the equitable principle on which the action is founded implies the

promise. When the fact is found that the defendant has the plaintiff's money, if he can show neither legal nor equitable ground for keeping it, the law creates the privity and the promise."

The rule was announced by the court of king's bench as early as 1725, in the case of *Attorney General v. Perry*, 2 Com. 481, that

"Whenever a man receives money belonging to another without any reason, authority, or consideration, an action lies against the receiver as for money received to the other's use; and this as well where the money is received through mistake, under color, and upon an apprehension, though a mistaken apprehension of having good authority to receive it, as where it is received by imposition, fraud, or deceit in the receiver."

In addition to the authorities already cited, the proposition is fully sustained in *Haebler v. Myers*, 132 N. Y. 363 (28 Am. St. Rep. 589) (30 N. E. 963); *United States v. State Bank*, 96 U. S. 30; *Criswell v. Whitney*, 13 Ind. App. 67 (41 N. E. 78); *Board v. Robinson*, (N. M.) 34 Pac. 295; *Brand v. Williams*, 29 Minn. 238 (13 N. W. 42); *Knapp v. Hobbs*, 50 N. H. 476. Respondent's counsel concede "that the considerations relating to the liabilities of individuals in such cases apply to respondent;" and we know of no reason why the common obligation to do justice, which is binding upon individuals, is not equally applicable to a county. Indeed, in many of the cases cited, the action was upheld against municipal corporations.

A further defense, of the statute of limitations, was interposed by respondent to five of the thirty-five causes of action. As to this defense, the lower court found against the respondent, and we think its finding in this particular was correct.

For the reasons given, we think that the appellant

Aug. 1896.]

Syllabus.

is entitled to recover; and the judgment will be reversed, and the cause remanded for further proceedings in accordance herewith.

ANDERS and DUNBAR, JJ., concur.

[No 2126. Decided August 20, 1896.]

GAMMA PONCIN, *Respondent*, v. JACOB FURTH *et al.*,
Administrators, Appellants.

15	201
18	506
19	613
15	201
28	324

JURY — PEREMPTORY CHALLENGES — WAIVER — ACTION ON DECEDENT'S
NOTE — EVIDENCE — PROOF OF HANDWRITING — PRESUMPTIONS —
JUDGMENT FOR ATTORNEY FEES — STATUTES — VOID AMENDMENT.

Under the provisions of Code Proc., § 348, governing peremptory challenges, the defendant cannot proffer a peremptory challenge to a juror on the panel, when the jury has been passed for cause and the defendant has failed to peremptorily challenge such juror until after several talesmen have been called and examined in place of jurors excused at the peremptory challenge of the plaintiff, as the right of challenge must be exercised alternately by the adverse parties.

The testimony of a witness as to the signature of a decedent is sufficient to go to the jury, when it appears that the witness had been intimately acquainted with the deceased for a period of forty years, a part of the time in partnership, that their business relations were extensive and frequent, and that he had often seen the deceased sign his name, and was as familiar with the handwriting of deceased as with his own, and had no doubt that the signature in evidence was that of deceased.

A witness is competent to testify to his opinion as to the genuineness of handwriting, after showing knowledge of the handwriting, founded on adequate means of knowledge, there being no precise standard fixing the degree of knowledge necessary.

The rule that a valuable consideration for a note is presumed from the proof of due execution and the production of the note by a plaintiff, applies alike in actions against the maker while alive, and in actions against his administrators upon the rejected claim founded upon such note.

The attempted amendment of § 1468, Code 1881, by reference to its section number, in the act of 1883, being ineffectual, such section continues in force as now incorporated in Code of Procedure as § 980.

In an action on a promissory note, plaintiff is entitled, under Code Proc., § 803, to judgment for an attorney's fee in any amount specially contracted for.

Appeal from Superior Court, King County.—Hon. RICHARD OSBORN, Judge. Affirmed.

Carr & Preston, White, Munday & Fulton, and H. E. Shields, for appellants.

Struve, Allen, Hughes & McMicken, for respondent.

The opinion of the court was delivered by

GORDON, J.—The appellants are administrators of the estate of Henry L. Yesler, deceased, and appeal from a judgment of the superior court of King county, rendered in an action by respondent upon the promissory note of the said Yesler. The complaint in the action alleges in substance that the said Yesler on the 2d day of December, 1890, for value received, duly made and delivered his promissory note payable to the order of the respondent, said note being for the sum of \$23,477.22, bearing interest at one per cent. per month from date, payable at maturity, said note being payable "twenty years after date without grace or upon my death should I die before twenty years." The note also contains provision for the payment of five per cent. attorney's fees in case of suit or action upon the note. The complaint further alleged the presentation of the claim to the defendants as administrators and that the same was rejected by them; that respondent is the owner and holder of the note and that the same has not been paid. All of the allegations of the complaint were

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denied by the answer save only the allegation relating to the presentation and rejection of respondent's claim by the administrators, which allegation is expressly admitted.

The appellants complain of the ruling of the court in disallowing their peremptory challenges to jurors Bradley and Carpenter. The record discloses that both plaintiff and defendants had examined the jurors as to their qualifications and "passed for cause." Thereupon the plaintiff interposed a peremptory challenge to one of the jurors and the juror having been excused, another was called, examined and passed by both parties. Thereupon counsel for the defendants remarked, "We will take the jury." The plaintiff proceeded to exercise a second peremptory challenge and another juror having been called, examined and passed for cause, defendants' counsel proffered a challenge to juror Bradley, who was on the panel when counsel for defendants had waived their first peremptory challenge. The court refused to allow the challenge, holding that defendants had waived their right of challenge as to jurors in the box at the time when defendants were called upon to take their first peremptory and could only exercise the right as to jurors thereafter called.

We think the ruling was right. Sec. 348, Code of Procedure (Vol. 2, Hill), is as follows:

"The jurors having been examined as to their qualifications, first by the plaintiff and then by the defendant, and passed for cause, the peremptory challenges shall be conducted as follows, to wit:—The plaintiff may challenge one, and then the defendant may challenge one, and so alternately until the peremptory challenges shall be exhausted. The panel being filled and passed for cause, after said challenge shall have been made by either party, a refusal to

challenge by either party in the said order of alternation shall not defeat the adverse party of his full number of challenges, but such refusal on the part of the plaintiff to exercise his challenge in proper turn shall conclude him as to the jurors once accepted by him, and if his right be not exhausted, his further challenges shall be confined, in his proper turn, to talesmen only."

Counsel for the defendants insist that the rule adopted by the court is applicable only to the plaintiff. The statute is incomplete, but we do not think that the legislature could have intended to prescribe one rule for the plaintiff and a different one for the defendants. The construction contended for by appellants would be most unjust to a plaintiff and its adoption would not place the parties to the controversy upon an equal footing, as we think the legislature intended that they should be. Jurors Carpenter and Bradley were in the box when the defendants were called upon to exercise their first peremptory challenge. They were then afforded an opportunity of challenging one of said jurors. They elected to waive that right and were thereafter properly restricted in exercising subsequent challenges to jurors thereafter called.

Cases cited by the appellants from Michigan and California are not regarded by us as being applicable, inasmuch as the subject in those states appears to be unaffected by statute, but were we to adopt the construction claimed for this statute by appellants' counsel, we think the ruling of the court should be regarded as harmless error merely, inasmuch as we have concluded from an examination of the evidence that the jury would not have been warranted in finding for the defendants. The evidence was all one way and it was sufficient to have warranted a peremptory instruction

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in favor of respondent. The answer consisted of denials and no affirmative defense was set up. The proof upon the part of the plaintiff was full and ample and the verdict the only one which could be permitted to stand, no matter what the personnel of the jury.

2. We do not think that the court committed any reversible error in overruling defendants' objections to the several questions propounded to witnesses examined by the respondent, or in denying the several motions to strike out the testimony of said witnesses. There was no subscribing witness to the note, nor was any one produced who claimed to have seen the deceased sign it. Various parties were examined, however, who showed themselves to be familiar with the handwriting of the deceased. The witness Denny, for example, testified that he had been intimately acquainted with the deceased for upwards of forty years, a portion of which time he was in partnership with him; that his business relations with him were extensive and frequent, and that he had frequently seen the deceased sign his name. Witness added, "I might say I was almost as familiar with his handwriting as I was with my own." Thereupon the witness being shown the note in suit gave it as his opinion that the signature was the signature of the deceased, adding: "I have no doubt of that being his signature." Similar testimony was given by other witnesses. Appellants insist that no proper foundation had been laid for this testimony and that none of the witnesses were shown to be competent to give an opinion as to the genuineness of the signature in question.

"There is no precise standard fixing the degree of knowledge necessary. The question of qualification

depends rather on the source of knowledge than its degree. . . . After showing knowledge of the handwriting . . . founded on adequate means of knowledge, the witness may testify to his belief or his opinion, as to genuineness; and this evidence is sufficient to go to the jury in proof of execution." Abbott, Trial Evidence, pp. 394, 395.

3. It is next insisted that the court erred in overruling defendants' objection to the introduction in evidence of the note. The objection is that there was no sufficient proof that it was made for a valuable consideration or of its delivery and non-payment. Appellants concede that while in an action upon a note against the maker, these would be presumed from the proof of due execution and production of the note by a plaintiff, still in this action the suit is not upon the note, but upon the *rejected* claim, and that no presumptions will be indulged as against the administrators of the deceased maker.

As already noticed the answer to the suit contains denials only; payment and want of consideration are affirmative defenses and should be pleaded. We are cited to no authority which supports the contention that the rules of evidence are changed when a suit is brought upon negotiable paper against the legal representative of a deceased person and that "the death of the maker . . . wipes out the presumptions and rules of evidence which control such paper among living persons."

The contrary doctrine is recognized in *Carnright v. Gray*, 11 N. Y. Supp. 278; also, *Garrigus v. Home, Frontier & Foreign Missionary Society*, 3 Ind. App. 91 (28 N. E. 1009).

4. Upon the trial the court over the objection of appellants permitted the claim which had been rejected by the administrators and the letter accom-

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panying the rejection to be introduced. The purpose for which these were offered is stated by the respondent's counsel to have been to show that the administrators had required no vouchers of the plaintiff as they were by law authorized to do. We think the proof was competent; also, that it was quite immaterial under the pleadings. It was at most a harmless error, and does not justify argument.

5. The verification to the claim presented to the administrators was sufficient under § 980, Code Proc., and that section was in full force at the time when the verification was made. *State v. Halbert*, 14 Wash. 306 (44 Pac. 538).

6. The effect of the verdict and judgment is determined and controlled by the statute, § 990, Code Proc. (Vol. 2, Hill), and their form is of the least importance.

7. It was not error for the court to include the attorney fee provided for by the note. *Wolverton v. Exchange National Bank*, 11 Wash. 94 (39 Pac. 247).

An examination of the entire record fails to disclose any reversible error and the judgment will be affirmed.

HOYT, C. J., and SCOTT, ANDERS and DUNBAR, JJ.,
concur.

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[No. 2067. Decided August 28, 1896.]

SARAH CARROLL, *Respondent*, v. ANDREW F. BURLEIGH
Receiver of the Northern Pacific Railroad Company,
Appellant.

CARRIERS—INJURIES TO PASSENGERS—CONTRIBUTORY NEGLIGENCE—
INSTRUCTIONS.

A passenger upon a freight train, which also carries passengers, who has been injured by the sudden starting of the train while alighting, is not guilty of contributory negligence, as a matter of law, in attempting to alight therefrom before it had pulled up to the depot platform, or before notice to get off had been given, when the train had come to a stop a few feet distant from the platform, where it appears that the train stopped at this time at its usual place of stopping, that it was customary for the passengers to get off at that place or when the first stop was made, and that the plaintiff had knowledge of such custom.

The fact that the court, in charging the jury as to the right of plaintiff to recover in case of the defendant's negligence, left out of consideration the question of contributory negligence of the plaintiff, is not error, when the court expressly charges the jury upon that point later in the course of its instructions.

Appeal from Superior Court, King County.—Hon.
RICHARD OSBORN, Judge. Affirmed.

Ashton & Chapman, for appellant.

W. H. Thompson, E. P. Edsen and John E. Humphries, for respondent.

The opinion of the court was delivered by

SCOTT, J.—Plaintiff brought this action to recover for injuries sustained by being thrown from the defendant's train, and, obtaining a judgment, the defendant has appealed.

The train in question was a freight train, but it also carried passengers. On arriving at plaintiff's desti-

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nation the train came to a stop a few feet distant from the depot platform and plaintiff arose to alight, and as she got upon the rear platform the train suddenly started and threw her to the ground, whereby she was injured.

Appellant contends that the plaintiff should not have been allowed to recover because she was guilty of contributory negligence in getting up to leave the car before it had pulled up to the platform, or before notice to get off had been given. But there was testimony to show that the train stopped at this time where it usually stopped, and that it was customary for the passengers to get off at that place, or when the first stop was made, and that the plaintiff had ridden upon such train several times before. Under such circumstances we could not hold as a matter of law that the plaintiff was guilty of contributory negligence in attempting to leave the car as she did. At most it could have been but a question of fact for the jury, and it was properly submitted to them under the instructions of the court.

Several of the instructions are also complained of by the appellant. As to the first one, it is contended that the court in instructing the jury as to the right of the plaintiff to recover in case the defendant was negligent, left out of consideration the question of contributory negligence of the plaintiff. But, conceding this to be true, the court expressly instructed the jury later on, that notwithstanding the negligence of defendant, if the plaintiff's negligence contributed to the injury, she was not entitled to recover, and consequently there was no error.

We think there is no error in any of the instructions, that the cause was fairly submitted to the jury, and

that the proof was sufficient to sustain the verdict obtained by the plaintiff. There being no other matter complained of calling for special attention, the judgment is affirmed.

ANDERS, GORDON and DUNBAR, JJ., concur.

[No. 2203. Decided August 28, 1896.]

JOHN M. PATTON *et ux.*, *Appellants*, v. OLYMPIA DOOR
AND LUMBER COMPANY, *Respondent*.

EMINENT DOMAIN — OBSTRUCTION OF STREET BY RAILWAY TRACK — DAMAGE TO ABUTTING PROPERTY.

Where, under an agreement between a millowner and a railroad company, a railroad switch has been constructed by the millowner, from the railroad to a mill for the purpose of running cars over same for the benefit of the mill, the millowner cannot escape liability for damages occasioned by the necessary operation of the switch in the customary manner, although the trains may be run and operated by the railroad company.

If the owner of a lot has been damaged in a manner different from that of the public generally by the appropriation of a street for railroad purposes, he is entitled to compensation.

There is proof of damages peculiar to plaintiff in the construction and operation of a railroad track in the street in front of his dwelling house, when it appears that the track runs so close to the sidewalk that a team cannot stand between them clear of the track, and that the dwelling house is damaged and rendered of less value by the running of trains over the track.

Appeal from Superior Court, Thurston County.—
Hon. T. M. REED, JR., Judge. Reversed.

Solon T. Williams, for appellants.

Charles H. Ayer, and *Haight & Owings*, for respondent.

The opinion of the court was delivered by

SCOTT, J.—The appellants are the owners of a lot

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fronting on Jefferson street in the city of Olympia. On one side of the lot, a short distance therefrom, said street is crossed by the track of the Tacoma, Olympia & Gray's Harbor Railroad Company. On the other side of the lot, several blocks distant, is situated a saw mill and manufacturing plant operated by the respondent. In pursuance of an agreement entered into between the respondent and the railroad company, a railroad track was constructed upon said street in front of appellants' premises, to be used as a switch connecting with the main track. While said switch track was being constructed, appellants brought this action to enjoin the same, alleging that the construction thereof would cause great damage to their lot and dwelling house thereon, and that the respondent had not made or paid into court any compensation to appellants therefor. A temporary restraining order was issued which, upon motion of the defendant, was afterwards vacated, and upon said hearing the court made findings of fact and entered a decree dismissing the action, and the plaintiffs have appealed.

The respondent does not dispute the building of the switch track, but contends that it has nothing to do with the running of trains over it, and is in no wise liable therefor; and furthermore, that the appellants' premises were not damaged, and consequently that the action was properly dismissed. It is evident from the proofs that the track was constructed principally for the benefit of the respondent, for the purpose of running cars over the same to the mill operated by it. This being the plain purpose for the construction of the switch, respondent could not escape liability for damages occasioned to the appellants by the necessary operation of the switch in the customary manner.

In the case of *Hatch v. Tacoma Olympia, etc., R. R. Co.*,

6 Wash. 1 (32 Pac. 1063) we held that if the owner of a lot had been damaged in a manner different from that of the public generally by the appropriation of a street for railroad purposes, he was entitled to compensation, and that holding governs this case, for we are of the opinion that the appellants have sustained a peculiar or special damage.

It appears that said switch track is built upon a curve and that it runs in close to the side of the street upon which the appellants reside, so close that a team cannot stand there clear of the track; and, also, there is proof to show that their dwelling house is damaged and rendered of less value by the running of trains over the track. That there was some damage to the premises is apparent, and the court erred in dismissing the bill.

Except as aforesaid, the findings of the court will not be disturbed, but the cause will be reversed and remanded with instructions to give the respondent thirty days after the remittitur goes down within which to take such steps as may be necessary to determine the amount of damages, and to remunerate appellants therefor.

GORDON and DUNBAR, JJ., concur.

ANDERS, J., dissents.

[No 1999. Decided August 31, 1896.]

W. W. D. TURNER, *Respondent*, v. THE GREAT NORTHERN RAILWAY COMPANY, *Appellant*.

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22	88
23	479
22	481
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27	481
15	213
35	608

ACTION FOR DAMAGES — BILL OF PARTICULARS — CARRIERS OF PASSENGERS — TICKET AGENT — BREACH OF CONTRACT OF CARRIAGE — DAMAGES.

The refusal of the court, in an action for damages for failure to transport plaintiff, to require plaintiff to furnish a bill of particulars showing the respective amounts claimed for loss of time, trouble, annoyance, disappointment and anxiety of mind, is not an abuse of discretion, especially where the damages claimed are general in their nature and are not required to be specifically alleged.

A ticket seller in a union depot, whose business it is to sell tickets over various lines of railway whose trains enter and depart therefrom, is such an agent of any company furnishing tickets to be sold there, which are accepted by the conductors of its trains as its tickets, that the company is bound by any of the declarations of such ticket seller as to the running of its trains.

Passengers have a right, until otherwise informed, to rely on information received by them from ticket agents as to the arrival, departure and running of trains, in answer to inquiries concerning those matters, provided they do not disregard other reasonable means of information.

Where a railroad company fails to fulfill its contract to carry a passenger to a certain destination, the company is liable for the expense thereby incurred, including the cost of conveyance by other means and also that incident to unavoidable delay.

Damages cannot be recovered for anxiety and suspense of mind in consequence of delay caused by the fault of a common carrier in failing to transport a passenger to his destination pursuant to contract. (*Willson v. Northern Pacific R. R. Co.*, 5 Wash. 621, distinguished.)

The measure of damages for the loss of time incurred by an attorney through failure of a railroad company to transport him, is not what the time of practicing attorneys of his capacity is worth, but the most trustworthy basis would be his earnings as an attorney either before or after the particular time in question.

An instruction to the jury that, for loss of time, plaintiff, who was an attorney, was entitled to recover such sum as his time at

home, for the period he was delayed by reason of defendant's failure to transport him, was reasonably or fairly worth in his profession, is misleading when the only proof of the value of such time was the opinion of the plaintiff and other witnesses as to what it ought to be worth; and it is also misleading in view of the further fact that it left out of consideration the probability that plaintiff would have had professional employment, had he been at home during the period of his detention.

Appeal from Superior Court, Spokane County.—
Hon. JESSE ARTHUR, Judge. Reversed.

C. Wellington, and Jay H. Adams (M. D. Grover, of counsel), for appellant.

Graves & Wolf, for respondent.

The opinion of the court was delivered by

ANDERS, J.—This was an action for damages for the failure on the part of the defendant to transport the plaintiff and his wife over its line of railway from St. Paul, Minnesota, to the city of Spokane, in accordance with its agreement and duty.

The material facts set forth in the complaint are, briefly, that the defendant is, and at all the times mentioned in the complaint, was a corporation operating a line of railway from St. Paul to Seattle by way of the city of Spokane; that on May 30, 1894, the plaintiff purchased from the agent of defendant, at St. Paul, tickets for himself and wife, and procured checks for their baggage, over the defendant's railway from St. Paul to Spokane, and was induced so to do by the representation of said agent that defendant's passenger train, which would leave St. Paul on the said day, would reach the city of Spokane on the morning of the 2d day of June following, and that the tickets purchased from the defendant's agent were limited to that time and train; that defendant then

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well knew that it had not been able to run a through train from St. Paul to Spokane for several days prior to that time, and that owing to a serious break in its roadbed west of Havre, it would not be able to run such through train for a long time thereafter, which fact it negligently and fraudulently concealed from the plaintiff; that plaintiff and his wife took passage on defendant's passenger train which left St. Paul on the evening of May 30, 1894, and when said train reached Havre, the conductor thereof informed the plaintiff that because of some damage to defendant's road further west, in the state of Idaho, the train would proceed no further, but that the plaintiff and his wife would be taken on defendant's line of railway to Helena, Montana, from which place they would be carried to their destination over the line of the Northern Pacific Railroad Company, and that the tickets then held by plaintiff were good and would be honored for transportation over that road; that plaintiff arrived at Helena on June 1st, and, on the following day, boarded the first west-bound Northern Pacific train and presented his tickets to the conductor, who refused to accept them for transportation and required the plaintiff to pay the fare for himself and wife to Missoula, that being the end of the conductor's division; that owing to serious damage to that road caused by high water, plaintiff could proceed no farther, and was compelled to remain in Missoula from the second to the twentieth day of June; that on said last mentioned day plaintiff paid the fare demanded for transportation to his home at Spokane, which place he reached on the 21st day of June, having been delayed over night at Hope, Idaho, and that the expense necessarily incurred for extra railroad

fare and for board and lodging, during the delays at Helena, Missoula and Hope, was \$86.20.

It is averred in the complaint that —

“During their detention and delay plaintiff’s said wife, in consequence of said delay and her anxiety of mind as to their situation, became sick at said City of Missoula and was confined to her bed for several days, and plaintiff was much worried, vexed and annoyed because of his inability to make his wife comfortable, situated as they were at a hotel among strangers, far from home and without access to their baggage; that, because of said detention and delay and of his inability to reach his said home, plaintiff was greatly harrassed, troubled and perplexed about his business, and it otherwise caused him great annoyance, vexation and anxiety of mind because of his embarrassed situation, the uncertainty when they would reach their home, and the great dangers incident to traveling at that time. That in addition to said extra expense made necessary, as aforesaid, because of defendant’s negligent and fraudulent conduct in the premises, and of plaintiff’s delay and detention, as aforesaid, and consequent loss of time, worriment, trouble, annoyance and anxiety of mind, as aforesaid, he has been damaged in the further sum of \$1,000.”

The plaintiff, accordingly demanded judgment against the defendant for \$1,086.20. The defendant moved the court to require the plaintiff to furnish a bill of particulars showing the respective amounts claimed for loss of time, trouble, annoyance, disappointment and anxiety of mind, which motion was denied. The defendant then answered, denying all the allegations of the complaint, except that relating to the incorporation and business of the defendant, and that the plaintiff purchased the tickets mentioned in the complaint. From a judgment in favor of the plaintiff for the sum of \$750 this appeal is prosecuted.

It is claimed by defendant that it had a right, under § 205 of the Code of Procedure, to be advised, in advance, of how much plaintiff sought to recover for loss of time, how much for anxiety of mind, etc., that it might be prepared with its proofs to meet the allegations of the complaint, and that if the allegations as to loss of time, trouble, annoyance and disappointment of mind, authorized the introduction of any proof, the damages were special and the defendant was entitled to a statement of the particular items.

It has been repeatedly held in New York, under a statute like ours, and seems to be the settled rule, that the granting or refusing of a motion for a bill of particulars is within the sound discretion of the trial court, and its ruling in that regard will not be reviewed on appeal, except in cases where there has been a palpable abuse of such discretion. *Tilton v. Beecher*, 59 N. Y. 176 (17 Am. Rep. 337); *People v. Tweed*, 63 N. Y. 194; *Dwight v. Germania Life Ins. Co.*, 84 N. Y. 493.

No such case, we apprehend, is presented here. The object of the statute is to enable a party reasonably to protect himself against surprise on the trial (*Butler v. Mann*, 9 Abb. N. C. 49); but we are unable to see how the defendant could have been surprised by the testimony adduced by the plaintiff corroborative of the averments of the complaint, to which defendant's motion for a bill of particulars was especially addressed. So far as the complaint is concerned, its allegations were sufficient to let in the evidence admitted. The damages claimed, or at least those claimed for loss of time, were general, and therefore were not required to be specifically alleged. Thompson, *Carriers of Passengers*, p. 550.

It appears from the testimony of plaintiff that he

purchased his tickets for transportation at the office of the Union Depot at St. Paul, and not at the office of the defendant company, and that the person from whom he purchased them was engaged in selling tickets over various other lines of railway whose trains entered and departed from that depot. Upon the trial, the court permitted the plaintiff, over the objection of defendant, to detail a conversation between himself and the ticket-seller, which occurred at the time the plaintiff purchased his tickets, in which the ticket-seller stated, among other things, that defendant's trains were running through to Spokane on schedule time, and, if there were no accidents, plaintiff would arrive at his destination on the morning of June 2, 1894.

It is contended that this was error for the reason that it was not shown that the person who made these statements was an agent of the defendant, and authorized to bind it by such declarations. But, the fact that the tickets so sold were furnished by the railway company, and were accepted as its tickets by the conductors of its trains, would seem to be sufficient proof that the seller was a ticket agent of the company and therefore clothed with the usual powers of such agents.

It is generally the fact that there is no other person than the ticket agent at a railroad station who can give travelers the necessary information as to the arrival, departure and running time of trains, and the rule, as formulated by a learned text writer, is, that passengers have a right, until otherwise informed, to rely on information received by them from ticket agents, in answer to inquiries concerning those matters, provided they do not disregard other reasonable means of information. 3 Wood, Railroads (Minor's ed.), 1654.

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The testimony objected to was certainly competent for the purpose of showing that the plaintiff himself was not in fault in taking the particular train on which he started home. It was also competent as tending to prove the contract between the parties, but, for that purpose, it was comparatively unimportant in view of the fact that the tickets themselves, which were *prima facie* evidence of the defendant's contract, represented upon their face that plaintiff would be carried to his destination within the time mentioned by the ticket seller.

Objection is made by the defendant to the action of the court in permitting the respondent to state to the jury the amount he was compelled to pay for board and lodging and other necessary expenses for himself and wife while at Missoula, and it is urged, with much earnestness, that the expense incurred at that place was not the result of the breach of defendant's contract, but of an independent, intervening cause, viz., the inability of the Northern Pacific Railroad Company, upon whose line the plaintiff had become a passenger, seasonably to carry him to his destination. The fact is, however, that the plaintiff and his wife while at Missoula were not passengers on the Northern Pacific Railroad, and the company operating that road had violated no contract with them, or duty or obligation concerning them. It carried them safely and promptly to that place and thereby discharged its whole duty. If plaintiff had, on arriving there, requested it immediately to convey him to Spokane, the fact that its road had been so damaged by floods and high water that it could not move its trains would have been a legal excuse for a failure to comply with such request. The plaintiff had no right of action against the Northern Pacific

Railroad Company for damages suffered by reason of the delay at Missoula, and it therefore follows that, if the defendant is not liable therefor, the plaintiff is without remedy, and must suffer a loss occasioned by no fault on his part.

But we do not think that the plaintiff is thus remediless. It was his privilege, if not his duty, on being informed that the defendant was unable to transport him in accordance with the terms of its undertaking, to procure some other reasonable means of conveyance, and proceed on his journey. He chose what seemed to him, and apparently to the conductor of the defendant's train, to be the most direct and expeditious route, and which, so far as we are advised, was the only one practicable. The omission of the defendant to fulfill its engagement caused the plaintiff to seek transportation over the Northern Pacific Railroad, and it is therefore justly liable for the expense thereby incurred, including that incident to unavoidable delay. 3 Sutherland, Damages (2d ed.), § 936; 2 Sedgwick, Damages (8th ed.), § 864.

In answer to the question "Now Colonel, I wish you would go on and state to the jury what, if any anxiety, worriment, etc., you suffered on account of your delay, being separated from your baggage, and all of those things that are proper under the ruling of the court, in consequence of this delay?" the plaintiff was allowed, notwithstanding the defendant's objection, to testify that he was greatly worried, troubled and annoyed by the combination of circumstances surrounding him at that time, among which were that he had to pay out more money than he had contemplated paying out; that the Northern Pacific Railroad Company would not board him at Missoula as they did their passengers; that his means were limited and

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he did not know how long he had to stay there; that he could not hear from home, the telegraph line being broken down; that his wife was taken sick and lay in bed three days in consequence of her worriment, and that he could not make her comfortable under the circumstances.

Damages for "worriment" and disappointment, resulting from such circumstances, are too remote to be recovered in this action. The mental anxiety of the plaintiff induced by the sickness of his wife and his inability to make her comfortable, or his limited means, or his inability to hear from home owing to the interruption of telegraphic communication, cannot be regarded as the proximate result of the alleged wrongful acts, or omissions of the defendant, and the court therefore erred in permitting this testimony to be submitted to the consideration of the jury.

The court also erred, and for the same reason, in instructing the jury generally that the plaintiff was entitled to recover for worry and mental excitement, such sum as would fairly and reasonably compensate him therefor.

"Damages will not be given for mere inconvenience and annoyance such as are felt at every disappointment of one's expectations, if there is no actual physical or mental injury." 1 Sedgwick, Damages (8th ed.), § 42.

And hence damages cannot be recovered for anxiety and suspense of mind in consequence of delay caused by the fault of a common carrier. *Triggs v. St. Louis, etc., Ry. Co.*, 74 Mo. 147, (41 Am. Rep. 305); *Hobbs v. London, etc., Ry. Co.*, L. R. 10 Q. B. 111; *Hamlin v. Great Northern Ry. Co.*, 1 Hurl. & N. 408; *Walsh v. Chicago, etc., Ry. Co.*, 42 Wis. 23 (24 Am. Rep. 376).

Nor, in an action against a railroad company for a

refusal to carry, can the plaintiff recover damages for fatigue suffered by him in walking to his place of destination, or for mental and physical suffering caused by sickness contracted in such walk. *St. Louis, etc., Ry. Co. v. Thomas*, 27 S. W. (Tex.) 419.

But it is urged by the learned counsel for plaintiff that this court, in the case of *Willson v. Northern Pacific Railroad Co.*, 5 Wash. 621 (32 Pac. 468), repudiated the doctrine that damages cannot be recovered for mental suffering, which is not connected with physical injury, and that the testimony and the instruction as to mental anxiety and excitement, above mentioned, were in accordance with the principles there announced. That was an action for damages for an unlawful expulsion of a passenger from a railway train, and, while it is true that we held, in accordance with what was deemed to be the weight of authority, that the plaintiff was entitled to compensation for the sense of wrong suffered and the feeling of humiliation and disgrace occasioned by the wrongful act, we did not undertake, or intend, to announce any rule with respect to the measure of damages in a case like the one at bar. That case is clearly distinguishable on principle from this, and the decision therein, in our judgment, in no wise militates against the views we have here expressed. In the *Willson* case, the court proceeded upon the theory that humiliation and mental distress were the natural and proximate, if not in fact the necessary result, of the wrongful act of the defendant, but in the present case, the necessary element of proximity is wholly wanting. The case of *St. Louis, etc., Ry. Co. v. Berry*, 15 S. W. 48, cited by plaintiff, and which supports his contention, seems to us to be contrary to sound policy and opposed to the general current of authority.

In fact, the trial court, in one portion of its charge to the jury, recognized and announced what we hold to be the correct doctrine, when it stated to the jury that the plaintiff could not recover damages for any mental suffering experienced by reason of the refusal of the conductor of the Northern Pacific Railroad Company to accept the tickets tendered to him by plaintiff for transportation; and for what reason, then, it told the jury that the plaintiff was entitled to damages for mental anxiety and suffering endured in consequence of his delay, we are unable to perceive. Surely no court could say that, in contemplation of law, the mental agitation or excitement caused by being delayed on a journey, is of a different character from that produced by unexpectedly having to pay extra fare for transportation. The mental sensation in each case, whether it be called excitement, anxiety, annoyance or worry, is manifestly the result of disappointed hope or expectation merely, for which, as we have seen, no damages can be awarded.

It appears from the evidence that the plaintiff is an attorney-at-law and well known as such at Spokane, but that he had not been engaged in the practice of his profession for two years prior to the time when his alleged cause of action arose, and, upon the trial, he testified that he estimated the time lost, by his being delayed, to be reasonably worth the sum of \$25 per day. Two other attorneys were also called as witnesses for plaintiff, one of whom stated that the services of attorneys of the ability and learning of the plaintiff, who were engaged in active practice in Spokane during the month of June, 1894, were worth from \$25 to \$30 per day, and the other, that they were worth from \$30 to \$40 per day.

All of this evidence was objected to on the alleged

ground that it was incompetent, irrelevant and immaterial, and it is here insisted that the court erred in overruling the objection. Now, it is evident that, if the plaintiff was delayed in reaching his destination by the fault of the defendant, he was damaged, on account of lost time, to an amount exactly equal to that which he would have earned by the practice of his profession (for it is as a lawyer only that he claims damages for loss of time), had he been at home during such delay; but, to entitle him to a recovery, it was incumbent upon him to prove such amount by competent and legal evidence.

As to the proof of damages for time lost by professional men, Mr. Sedgwick says :

“In the case of most professional men, there can be no way of fixing a general scale of remuneration. The exclusive services of such men cannot be measured by any pecuniary scale common to a whole class. The most trustworthy basis of damages in such a case is the amount which the injured party has earned in the past. This is, however, only evidence, from which the jury will be enabled to say what the services of such a man as the plaintiff are worth, and the jury should distinctly understand that it is not to be taken as the necessary and legal measure of damages.” 1 Sedgwick, Damages, (8th ed.), § 180.

And this statement of law seems to be amply supported by the authorities.

It is apparent therefore that the “most trustworthy basis of damages” was not adopted in the trial of this cause. There was no proof whatever of what the plaintiff actually earned, as an attorney, either before or after the particular time in question. Of course he earned nothing immediately before that time, because he had not been engaged in the practice of the law for the preceding two years, but as he resumed

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the practice of his profession immediately after his arrival at Spokane, we think it would have been proper to have shown what he earned thereafter, not as establishing in itself the value of his time, but as evidence to aid the jury in fixing it. It would even have been permissible to submit to the consideration of the jury, under proper instructions, proof of the earnings of the plaintiff when previously engaged in practicing law in the city of Spokane; but we are inclined to the opinion that it was hardly proper to prove what the time of practicing attorneys was worth, as that would constitute no fair basis of damages, where the value of a person's time depends so much upon his individual exertions.

Neither was it proper to permit the plaintiff himself to state his own opinion or "estimate" of the value of his time, without stating the facts upon which such opinion was based. Indeed, the testimony of each of the witnesses, who testified as to the value of an attorney's time, was substantially nothing more than an expression of his individual opinion upon the subject, and the question involved was not one of science or skill, such as could not be determined by a jury of ordinary intelligence, without the aid of the opinions of others. If facts only had been stated, the jury could have drawn their own conclusions. Upon this issue the jury were instructed that for loss of time, plaintiff was entitled to recover such sum as his time at home, for the period he was delayed by reason of defendant's failure to transport him, was reasonably and fairly worth in his profession or business. And as an abstract proposition of law, the instruction was correct, but as applied to the proofs it was mis-

leading, because it virtually authorized the jury to adopt the amount stated by the plaintiff himself, or that which they might infer from the testimony of either of the other witnesses, to be the reasonable value of plaintiff's time, as the absolute and certain measure of damages. Even if it were conceded that the evidence was admissible and that it showed a "general scale of remuneration" common to all attorneys, such as the plaintiff, the instruction would still be open to the same objection, for it left out of consideration entirely the probability that plaintiff would have had professional employment had he been at home during the period of his detention. *Yonge v. Pacific Mail S. S. Co.*, 1 Cal. 353; 3 Sutherland, Damages (2d ed.), § 936; 2 Sedgwick, Damages (8th ed.), § 863.

The jury should have been distinctly charged to weigh that probability for the manifest reason that the plaintiff's right to damages, for loss of time, depended upon the fact whether the time, during which he was delayed, would have been of pecuniary value to him if he had arrived at his destination without detention. Under the instructions as given, the jury were left to determine, as best they could, the amount of damages, without being informed as to the rule by which such damages should be measured. It is difficult at best to determine the value of time in a case like this, where such value is not governed by any established rate of wages, and it is therefore highly important that the jury should be fully informed as to the rules and principles by which they should be guided.

What we have already said renders it unnecessary for us to specially consider the remaining points made by the defendant.

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The judgment must be reversed and the cause remanded for a new trial.

HOYT, C. J., and GORDON, J., concur.

DUNBAR, J.—I dissent. I think no substantial error was committed by the court, and the judgment should be affirmed.

[No 2141. Decided September 2, 1896.]

JOHN J. CARNEY, *Respondent*, v. GEORGE SIMPSON,
Appellant.

15	227
24	142
15	227
26	218

DIVORCE—JURISDICTION OVER PROPERTY—PRESUMPTIONS—DAMAGES
FOR DETENTION OF PROPERTY.

Where a decree of divorce awards all the community personal property in the state to the wife, the jurisdiction over all of the property so awarded must be presumed in the absence of a showing to the contrary, and replevin by the husband will not lie to recover a portion of such personal property sold by the wife to a third party.

Where the wife has sold community personal property before the entry of a decree of divorce awarding it to her, and the husband has begun an action to recover same pending the divorce proceedings, he is merely entitled to a judgment for the costs of his action and for damages for detention of the property, when the decree in the divorce proceedings awards the property to the wife.

Appeal from Superior Court, Chehalis County.—
Hon. MASON IRWIN, Judge. Reversed.

George D. Schofield, for appellant.

Hogan & McGerry, for respondent.

The opinion of the court was delivered by

DUNBAR, J.—This was an action brought by a husband after a decree of divorce from his wife, to obtain

possession of specific personal property sold by the wife during coverture. It is conceded by the plaintiff (respondent here) that the property was community property, although one of the contentions of the appellant is that the property was the separate property of the wife at the time the transfer was made to the appellant.

There are a great many points raised in this case, but with our view in relation to one of them, it will not be necessary to discuss the others. Among other answers to the complaint, and by way of an affirmative defense, the defendant pleaded in bar of this action a decree of divorce and a distribution of the property of the respondent and his wife, Lestina Z. Carney, the party from whom the appellant purchased the same. Under this plea it is contended by the appellant that the only judgment that could be rendered was judgment for cost of suit, and damages for the detention of property. We think this contention must be sustained. This case was commenced on the 16th day of July, 1894, and was tried on the 22d day of May, 1895. The divorce proceedings were commenced on the 27th day of June, 1894, and the decree entered on the 29th day of September, 1894. No appeal was taken from the divorce proceeding. It is apparent that the decree of divorce is a final adjudication of the property rights of plaintiff and Lestina Z. Carney. It is true that the particular property described in this complaint is not described in the decree. It is also true that the pleadings under which the decree was granted were not made a part of the answer in the case at bar, but in the absence of a showing to the contrary, jurisdiction of the court to enter the decree must be presumed, and we think it is a fair pre-

Sept. 1896.] Opinion of the Court—DUNBAR, J.

sumption that the rights to all the property in this state were adjudicated in such action.

The decree in this case, outside of the fact that the property is not specifically described, is very full and comprehensive. The sixth finding of the court in the divorce case, which is embraced in the decree, is that the personal property described in said pleadings, mentioning a certain newspaper, and all of the horses, cattle, farming utensils, and all of the household furniture, library, books of account, and all other personal property of every name, nature and description, etc., have been acquired since the marriage of the parties to the action.

As conclusions of law, after describing the real estate, the decree continues that "the newspaper described in said pleadings as the Elma Chronicle, together with the printing presses, job presses, etc., the horses, cattle, stock, farming implements and utensils, household furniture, library, books of account, and all other personal property of every name, nature and description, acquired by the plaintiff and defendant since their marriage is community property, and said plaintiff is entitled to have all of said community property set aside to her for her sole use and benefit, and said plaintiff is entitled to the immediate possession and control thereof."

It seems to us that this decree, fairly construed, awarded all of the community personal property of every name, nature and description to the plaintiff in the divorce proceedings, and inasmuch as it expressly provides that *all* of the personal property shall be awarded to the plaintiff, the jurisdiction over all of the property so awarded must be presumed in the absence of a showing to the contrary, and inasmuch as the property sued for in this case is personal prop-

erty, and the character of personal property described in the decree,—viz., cattle, horses and farming implements,—is the same character of personal property, we are satisfied that the right of the husband to the possession of the same is barred by the decree, which was properly pleaded. The judgment will therefore be reversed, but inasmuch as the action was commenced before the decree was entered, the plaintiff will be entitled to the costs of the action, and would have been entitled to damages for the detention thereof. These damages, however, were determined by the jury to be one dollar. The case will therefore be reversed with instructions to the lower court to enter judgment in favor of the appellant for the sum of one dollar and costs of suit.

HOYT, C. J., and SCOTT and ANDERS, JJ., concur.

GORDON, J., not sitting.

[No 2187. Decided September 3, 1896.]

BANK OF BRITISH COLUMBIA, *Respondent*, v. RICHARD JEFFS, *Appellant*.

NEGOTIABLE INSTRUMENTS—SURETYSHIP—EVIDENCE OF—RELEASE
OF SURETY BY EXTENSION—ACCEPTANCE OF INTEREST IN ADVANCE
—BANKS—APPLICATION OF BANK DEPOSIT ON INDEBTEDNESS DUE.

A surety is not entitled to release by an agreement between the principal and payee to extend the time of payment of an obligation, when the agreement is too indefinite to be enforceable.

It may be shown by parol that one of two or more makers of a joint and several note was in fact a surety, and was known by the payee to be such when the note was taken.

Where a creditor, without inadvertence or mistake, receives a payment of interest in advance on the note of a debtor, and does not expressly reserve the right to sue before the expiration of the

15 230
18 137

15 230
41 418

Sept. 1896.] Opinion of the Court—GORDON, J.

period for which interest is taken, there is a contract created to extend the time of payment during the period for which the interest is paid.

The extension of the time of payment of a note for a day only, in consideration of the payment of interest in advance, is sufficient to release a surety, when made without his knowledge or consent.

The fact that the maker of a promissory note to a bank has on deposit therein a sum of money at the time his note is past due, and when action thereon is begun against a surety, does not impose a duty upon the bank to apply said sum in part payment of the note and thereby release the surety *pro tanto*.

Appeal from Superior Court, King County.—Hon. THOMAS J. HUMES, Judge. Reversed.

Thomas B. Hardin, and *Pierre P. Ferry*, for appellant.

Burke, Shepard & Woods, for respondent.

The opinion of the court was delivered by

GORDON, J.—This action is based upon a promissory note executed by T. M. Alvord, his wife M. J. Alvord, E. H. Alvord and appellant Richard Jeffs, said note being for the sum of \$10,000, made November 15, 1890, payable to the respondent, the Bank of British Columbia, one day thereafter, with interest after date at the rate of ten per cent. The action was brought against the appellant Jeffs alone.

The amended answer contains nine separate defenses, the first of which alleges that the sum for which said note was given was loaned by the respondent to the said T. M. Alvord; that the appellant was a surety only, and that after the execution of said note by appellant the same was altered without the knowledge or consent of the appellant, by the addition thereto of the signature of one E. H. Alvord as an apparent principal. The second, third, fourth, fifth, sixth and

seventh defenses all assert that after the maturity of the note the same was, for a sufficient consideration, extended from time to time as set out in said several defenses, and that each of said extensions was had without the knowledge or consent of the appellant. The eighth defense was an attempt to set out an agreement to extend, but it lacks definiteness and the lower court sustained a demurrer thereto. From an examination we are satisfied the demurrer was rightly sustained. *Stickler v. Giles*, 9 Wash. 147 (37 Pac. 293).

The ninth defense in substance alleged that in June, 1891, at a time when said note was due, T. M. Alvord had on deposit with the respondent the sum of \$3,000, which money had been borrowed by him from the respondent and had been placed to his general deposit account. This defense proceeds upon the assumption that it was the duty of the respondent to have credited the amount of said deposit upon said past due note, and that its failure to do so operated as a defense *pro tanto*.

A demurrer to the several defenses having been overruled, excepting only as to the eighth (as hereinbefore noticed), the respondent replied denying each and all of the allegations contained in the several defenses, and the cause having proceeded to trial, the court, at the conclusion of the testimony, over the objection of the appellant, withdrew from the jury the second, third, fourth, fifth, sixth, seventh and ninth defenses, instructing the jury to disregard the same in arriving at their verdict, and submitted the cause to them upon the issue raised by the first defense only, viz., as to whether there had been an alteration of the note subsequent to its execution by the appellant. Upon the issue thus submitted the jury returned a verdict for the respondent, upon which the court,

Sept. 1896.] Opinion of the Court — GORDON, J.

having denied appellant's motion for a new trial, entered its judgment, and the cause comes here on appeal.

It is contended in this court by the learned counsel for the respondent that the judgment was right in any event inasmuch as the note in question is signed by the appellant as an apparent maker, and it is urged that it is not competent for him to show that he executed the same in the capacity of a surety. So much has been said by courts and text-writers upon the proposition which is here urged that we deem it unprofitable to enter upon a discussion of the subject, and are content to announce that in our opinion the great weight of authority upon the question is against the contention of respondent, and that the trend of modern authority is against it. Nor do we think that it can be regarded as an open question in this state, and the right of one of two or more makers of a joint and several negotiable note to show by parol evidence that he was in fact a surety, and that that fact was known to the payee of the note when the same was taken, has been frequently recognized by this court. *Binnian v. Jennings*, 14 Wash. 677 (45 Pac. 302); *Warburton v. Ralph*, 9 Wash. 537 (38 Pac. 140); *Culbertson v. Wilcox*, 11 Wash. 522 (39 Pac. 954); *First National Bank v. Harris*, 7 Wash. 139 (34 Pac. 466).

Probably a different rule exists where one who is in reality a surety expressly declares in his contract that he is a principal or adds the word "principal" to his signature.

Proceeding to a consideration of the questions relied upon by the appellant for a reversal, aside from the error predicated upon the ruling of the court sustaining a demurrer to the eighth defense already

noticed, we think that the action of the court in withdrawing from the consideration of the jury the so-called defenses numbered 2, 3, 4, 5, 6 and 7, involves but a single question, and that it is not necessary to consider said defenses separately. The testimony introduced upon the trial relating to these defenses showed that the entire sum represented by said note, viz., \$10,000, was a loan of money to the said T. M. Alvord, and that the appellant Jeffs never received any part thereof; also that the respondent had full knowledge of that fact at the time when said loan was made and at all times thereafter. It further appears that on July 30, 1892, said Alvord gave respondent his check drawn upon the respondent bank against the account of said Alvord in said bank for the full amount of interest on the note in suit for the month of July, 1892. Said check was accepted by the respondent and charged to the account of Alvord on that day, and an endorsement thereupon made on the back of said note as follows: "Int. paid to the 31 July, '92." That on March 30, 1893, a similar check was given in payment of interest for the month of March, and a like endorsement was made by respondent upon the note; that on April 29, 1893, said Alvord by a similar check paid the interest on said note for the full month of April, and that the respondent upon said 29th day of April made an endorsement upon said note to the effect that the interest had been paid for that month. On May 24, 1893, Alvord gave to the respondent his check dated on the 20th day of May, 1893, for the amount of interest upon said note in full for said month of May, 1893. Upon the face of said check was contained the statement that it was given in payment of interest for that month. On the same day it was presented to the respondent and by it

marked paid, and on that day charged to the account of said Alvord, and at the same time an endorsement was made upon said note showing that the interest was paid thereon to May 31, 1893. On the 28th of June, 1893, a similar transaction occurred, viz., respondent received from said Alvord payment of the interest upon said note up to the 30th day of June of that year. Thus it will be seen that the various extensions relied upon were in some instances for a day only, and in none exceeding six days, and appellant's contention that extensions were made and for definite periods is based wholly upon the acceptance by the respondent in several instances of interest in advance; and these payments are relied upon as constituting valid extensions of the time for payment of the principal sum represented by the note. The officials of the bank testified that when these interest payments were made nothing was said about the payment of or extension of the time for the payment of the principal. The respondent insists that the payment of interest in advance is not a sufficient consideration to support an agreement to extend the time, but the contrary has been held by this court in the very late case of *Binnian v. Jennings*, *supra*.

After an examination of all of the authorities cited upon the main proposition we think the proposition is fully supported that where a creditor, without inadvertence or mistake, receives a payment of interest in advance on the note of a debtor, and does not expressly reserve the right to sue before the expiration of the period for which interest is taken, there is a contract created to extend the time of payment during the period for which the interest is paid. *Woodburn v. Carter*, 50 Ind. 376; *Crosby v. Wyatt*, 10 N. H. 318; *Peoples' Bank v. Pearsons*, 30 Vt. 711; *Hamilton v.*

Winterrowd, 43 Ind. 393; *Starret v. Buckhalter*, 86 Ind. 439; *New Hampshire Savings Bank v. Ela*, 11 N. H. 335; *Uniontown Bank v. Mackey*, 140 U. S. 220 (11 Sup. Ct. 844); *Wakefield Bank v. Truesdell*, 55 Barb. 602; *Kerns v. Ryan*, 26 Ill. App. 177; *Union Bank v. McClung*, 9 Humph. 97; *Scott v. Scruggs*, 60 Fed. 721.

In the case of *Preston v. Henning*, 6 Bush, 556, the court say upon this question:

“But it is argued for the appellees that although the acceptance of payments so made may have authorized an expectation that indulgence would be given, as no express contract to forbear is proved, none should be inferred. We are of a different opinion. The prepayments of interest being made as the price of indulgence, and received by the appellees with knowledge of that fact, and without notice to the payer that the forbearance thus paid for would not be given, *they were bound by an implied promise to forbear to sue until the expiration of the time for which the interest was paid.*”

In 2 Brandt on Suretyship, § 352, that learned author says:

The decided weight of authority, and it seems the better reason, is that the payment in advance of interest on the debt by the principal to the creditor *is of itself without more* sufficient *prima facie* evidence of an agreement to extend the time of payment for the period for which the interest is paid, and works the discharge of the surety.”

Of course upon principle the extension of the time of payment for six days, or for a day only, would operate to release the surety as fully and effectually as if made for a year. Brandt, Suretyship, § 344; *Kerns v. Ryan*, *supra*; *Winne v. Colorado Springs Co.*, 3 Colo. 155; *Ducker v. Rapp*, 67 N. Y. 464; *Berry v. Pullen*, 69 Me. 101 (31 Am. Rep. 248).

Our conclusion therefore is that the court erred in

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Syllabus.

withdrawing said defenses from the consideration of the jury.

The remaining question relates to the partial defense urged by the appellant, and is designated "affirmative defense No. 9." We do not think that it was the duty of the respondent to have applied the \$3,000 which was on deposit in its bank, to the credit of the said T. M. Alvord, in part payment of the note in question. This deposit was the result of a temporary loan made by the respondent to the said Alvord and by him subsequently checked out. We think there is no authority that would sustain the contention of the appellant in this behalf. *Voss v. German American Bank*, 83 Ill. 599.

For the error above noticed the judgment will be reversed and the cause remanded.

ANDERS and DUNBAR, JJ., concur.

[No. 2097. Decided September 17, 1896.]

DEL CARY SMITH, *Respondent*, v. ELLA W. SMITH,
Appellant.

15	237
17	431
15	237
28	218

DIVORCE—CUSTODY OF CHILDREN.

The care and custody of children of tender years should be awarded to the mother upon the granting of a divorce, when it is not made to appear that the mother is not a proper person to have the care and control of her children.

Appeal from Superior Court, Jefferson County.—
HON. J. G. McCLINTON, Judge. Reversed.

A. W. Buddress, and W. R. Gay, for appellant.

Trumbull & Trumbull, for respondent.

The opinion of the court was delivered by

DUNBAR, J.—The only real controversy presented in this case, or at least the only error which was alleged in the oral discussion in this court, was the awarding of the care and custody of the daughter, Mildred Helen Smith, to the plaintiff.

An examination of the long record in this case fails to convince us that the mother is not a proper person to have the care and control of her children, and, the children both being of tender years, under the general rule their care and custody should have been awarded to the mother, the defendant in this case. The second paragraph of the decree provides that the four year old girl, Mildred Helen Smith, be awarded to the plaintiff, and that the care and custody of the infant daughter be awarded to defendant, and that the plaintiff be required to pay to the defendant on the first day of each and every month, until further order of the court, the sum of fifteen dollars as alimony and for the support of said child awarded her; and further decrees that each of the parties shall have the right at reasonable times to visit and see the child hereby awarded to the other.

This case will be remanded to the lower court with instructions to change said paragraph to the effect that the care and custody of both the children mentioned in the decree be awarded to the defendant, and that the plaintiff be required to pay to the defendant, on the first day of each and every month, the sum of twenty-five dollars as alimony and for the support of said children awarded the defendant, with the provision in the decree that the plaintiff shall have the right at reasonable times to visit and see the children above mentioned. The remaining part of the decree

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will not be disturbed. The costs of the case will be taxed to the respondent.

HOYT, C. J., and ANDERS and SCOTT, JJ., concur.

[No 2124. Decided September 17, 1896.]

MARY A. SMITH *et al.*, Appellants, v. ANDREW C. SMITH *et al.*, Executors, Respondents.

WILLS — CONSTRUCTION — TRUSTEES — PROBATE JURISDICTION.

Where trustees of the property of an estate, instead of executors, have been appointed by a will, the probate court has no jurisdiction of questions involving their management of the estate, but the same are triable in equity.

A will devising and bequeathing to certain persons all the testator's property, "in trust, nevertheless, to and for the following uses and purposes," etc., constitutes such persons trustees, though they may be denominated in the will as executors, especially when it appears from the will construed as an entirety, that such was the intent of the testator, inasmuch as a non-resident is named as one of the executors and certain trust property of the testator is included in the devise.

Appeal from Superior Court, Pierce County.—Hon. EMMETT N. PARKER, Judge. Affirmed.

Doolittle & Fogg, for appellants.

Parsons, Corell & Parsons, for respondents.

The opinion of the court was delivered by

DUNBAR, J.—This case involves the construction of a will. The petition of the appellants charges the respondents with mismanaging the estate of decedent, Edward S. Smith, and prays for an accounting by the said alleged executors, for the revoking and setting aside of an order theretofore made by the court ac-

15	239
19	608
15	239
21	192
21	578
15	239
28	103
28	120
15	239
29	434

cepting the report of said executors, and for the removal from office of said executors and the appointment of some suitable person in their stead, and for other relief. A demurrer was interposed to the petition, which demurrer was sustained by the court. Judgment for costs was rendered and from such judgment on the demurrer appeal was taken to this court.

The appellants' brief in this case is exceedingly elaborate. Hundreds of cases are cited, but the brief is so prepared that it is difficult to determine frequently whether the learned author is quoting the decisions of courts or is setting forth his own argument in the case, and this defect in the brief has necessitated an examination of many cases, which examination might have been otherwise obviated. We have examined many, but not all of the authorities cited, but have obtained very little light from such cases, for they seem to us not to bear on the construction of such a will as the one which is before us. The petition in this case is extremely redundant, prolix and tautological, and is attacked by the demurrer for several alleged defects; but outside of the question as to whether or not the petition sets forth facts sufficient to constitute a cause of action in that it does not show that a sufficient notice of the former settlement of the executors had not been made and that it was defective for want of all the proper parties plaintiff, we think the first objection to the petition, that the probate court did not have jurisdiction to entertain the petition, must be sustained. We think it will be conceded that if the respondents were made trustees of the property of the estate by the will, instead of executors, the probate jurisdiction could not attach, but that the case should be tried by a court of equity, and the respondents should be called upon to account

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for their trust under the statute of trusts instead of under the statute of probate. So that the pivotal question is, were these respondents trustees or executors.

The portion of the will necessary for construction is as follows :

“ I, Edward S. Smith, of Tacoma, in the County of Pierce and Territory of Washington, being of sound and disposing mind, do make, publish and declare this my last will and testament in manner following, hereby revoking all former wills by me made.

“ 1st. I appoint my brother, Andrew C. Smith, of Rochester, Minnesota, and my friend, George O. Kelly, of said Tacoma, executors of this my last will and testament, to serve without giving bonds, and direct that, in case of the death of either of them, the survivor may act and do all things that both could do if living.

“ 2nd. I give, devise and bequeath to my said executors, all and singular my property, real and personal, and all property standing in my name, where-soever situated, in trust, nevertheless, to and for the following uses and purposes, viz.: I direct my said executors to sell all and singular the said property, both real and personal, at such time, in such manner, and on such terms and for such prices, as is in their opinion for the best interest of my estate, and to convey the titles to said real estate by deed, and from the net proceeds of said sales, belonging to said estate, after paying to my wife such sums as in their opinion may be required for her support, to divide the remainder equally between my children, share and share alike.

“ 3rd. And, whereas certain real property which I hold is of such a character that it may be considered by my said executors that it should not be sold immediately, the same, or any part of it, may be held by them, in their discretion, for a period not exceeding ten years.”

It seems to us that this will, construed as an entirety, plainly indicates that it was the intention of the decedent to make trustees of these respondents, although they are denominated executors by the will. All that the deviser probably meant was that these respondents should execute the trust, for the duties which he imposed upon them were purely and simply the duties of trustees. This is set out in the second paragraph of the will, after the words: "I give, devise and bequeath to my said executors all and singular my property, real and personal, and all property standing in my name wheresoever situated," by the qualifying words, "*in trust, nevertheless, to and for the following uses and purposes.*" That is, notwithstanding the devise and bequest to the said executors, nevertheless said devise and bequest was in trust for the uses and purposes specified. Had the word "executors" not been used by the deviser it could not have been contended that the will did more than to appoint the respondents trustees of the estate.

Again, under our laws an executor of an estate must be a resident of the state in which the estate is situated, and this will especially recites that one of the executors, viz., Andrew C. Smith, is a resident of Rochester, Minnesota. Again, the will itself shows that a portion of the property of the estate, and which was bequeathed to the respondents, was property not belonging to the deviser but property for which he was a trustee and therefore property for which he could not have appointed an executor; for there is no case which goes to the extent of holding that where the decedent was himself a trustee of the property devised, either his executor or trustee, by whatever name he might be called, or the property so held in trust, would be subject to the jurisdiction of a probate

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court. Altogether, we think it was the evident intention of the devisor to constitute the respondents here trustees only of his estate.

This was the view taken by the court below upon the approval of the report of the respondents heretofore mentioned, and the order of the court was :

“And it further appearing that the said Andrew C. Smith and George O. Kelly, as devisees and trustees of the estate of said decedent, have not fully closed the trust imposed upon them by said will, and that their duties as executors in connection with their said office as trustees, to which this court as a court of probate is without jurisdiction, and as the court is of the opinion that all of said matters can be more fairly and equitably adjusted upon their final report and statement of their account as such trustees, it is ordered that all said matters and the further hearing hereof be continued until such final settlement of such trustees shall be had, including their compensation as such executors and all such allowances as may seem upon such final accounting to be just and proper, or shall at any time be found and awarded by this court sitting in equity, with leave to said executors at any time to apply for such further order or orders herein as they may be advised are proper for the final completion of their duties.”

The record shows that an action in equity for an accounting has been commenced in this case and is now pending. We think all the relief which appellants claim can be properly obtained in that action or in some other action brought for an equitable accounting by these trustees, and that the demurrer to the petition was rightfully sustained.

HOYT, C. J., and ANDERS and GORDON, JJ., concur.

[No 2212. Decided September 18, 1896.]

COLEMAN McDONOUGH, *Respondent*, v. THE GREAT
NORTHERN RAILWAY COMPANY, *Appellant*.PLEADING — AMENDMENT DURING TRIAL — EXCESSIVE DAMAGES — REMIS-
SION OF EXCESS — DUTY OF MASTER TO SERVANT — FELLOW SERVANTS
— EXCEPTIONS TO INSTRUCTIONS.

It is within the discretion of the court to permit the amendment of a complaint by plaintiff after the close of his testimony, and it is not an abuse of such discretion when the amendment is not of such a character as to materially change the cause of action, nor such as to occasion surprise or place opposing counsel at a disadvantage.

Where the trial court finds that a portion of the damages assessed by the jury is excessive, it is not required to grant a new trial, but may properly direct a remission of the excessive portion of the verdict.

A foreman in charge of railway construction work, with authority to employ and discharge workmen and direct them in the performance of their work, and who is the sole representative of the company at the place or within miles thereof, stands in the position of a vice principal, although it may be the duty of such foreman to receive orders from, and report to, the roadmaster, whose headquarters were at a considerable distance from the place of work.

The master owes a positive duty to an employee, not only to provide him with a reasonably safe place in which to work, so far as the nature of the work undertaken and the exigencies of the case will permit the same to be made reasonably safe, but also to observe such care as will not expose the employee to perils and dangers which may be guarded against by reasonable care and diligence; and where the performance of this positive duty is by the master entrusted to another, his failure to perform is the failure of the master.

Under Laws 1893, p. 112, § 4, providing that "Exceptions to a charge to a jury . . . may be taken by any party by stating to the court . . . that such party excepts to the same, specifying . . . the parts of the charge excepted to," a general exception to a charge of the court setting forth four distinct elements of damage upon which plaintiff might recover, if he made out his case, is insufficient for the purpose of securing a review on appeal, when three of the elements of damage discussed by the court are manifestly correct, and the attention of the court was not directed to the particular portion of the charge complained of.

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Appeal from Superior Court, Spokane County.—
Hon. WALLACE MOUNT, Judge. Affirmed.

C. Wellington, and *Jay H. Adams* (*M. D. Grover*, and
Will H. Thompson, of counsel), for appellant.

In the absence of a specific allegation that defendants' negligence caused the injury complained of, the complaint is bad on demurrer, unless it clearly appears from the complaint that the servant, whose negligence is charged and relied on for a recovery, stood in the place of the master as vice-principal, or was negligent in the discharge of a duty owed by the master to his employees. *Brazil, etc., Coal Co. v. Cain* 98 Ind. 282; *Indiana Car Co. v. Parker*, 100 Ind. 181; *Capper v. Louisville, etc., Ry. Co.*, 103 Ind. 305; *Thompson v. Chicago, etc., Ry. Co.*, 18 Fed. 239; *Hoth v. Peters*, 55 Wis. 405.

The rule requiring the master to provide a safe place for the servant does not apply where the work of the servant consists in making a dangerous place safe, or in constantly changing the character of the place for safety, as the work progresses, but in such cases the servant assumes the risk of the dangerous place and of the increase of danger caused by the work. *City of Minneapolis v. Lundin*, 58 Fed. 525; *Finlayson v. Utica Mining & Milling Co.*, 67 Fed. 507, and authorities cited.

Where it is found that the damages assessed are, in fact, excessive, there should be a new trial granted as provided by statute. In the case at bar, one-third of the amount of the verdict the court required to be remitted, and to that extent the damages assessed were excessive, and were the result of passion or prejudice as found by the court below. And where

such is the finding, the rule provided by statute should be imperative and a new trial granted. *Atchison, etc., Ry. Co. v. Dwelle*, 24 Pac. 500; *Steinbuechel v. Wright*, 23 Pac. 560; *Gulf, etc., Ry. Co. v. Coon*, 7 S. W. 492; *Bell v. Morse*, 29 Pac. 1086; *Nunnally v. Taliaferro*, 18 S. W. 149; *Missouri, etc., Ry. Co. v. Perry*, 27 S. W. 496; *Brunswick L. & W. Co. v. Gale*, 18 S. E. 11; *Unfried v. Baltimore & Ohio R. R. Co.*, 12 S. E. 512.

It was error for the court to instruct the jury that, in the event of a verdict for the plaintiff, he would be entitled to recover such a sum as would compensate him for any loss of power or ability to earn money in and about his occupation and business, for such a time subsequent to the period of six months after the date of receiving the injury as the same will probably continue, when the allegation of the complaint was that he was prevented from following his usual avocation for the period of six months, and it is not averred that after the expiration of such time his injury was of such a nature as to lessen his earning power or prevent his following his usual avocation. *Slaughter v. Metropolitan St. Ry. Co.*, 23 S. W. 760; *Coontz v. Missouri Pacific Ry. Co.*, 22 S. W. 572; *Chicago, etc., Ry. Co. v. Klauber*, 9 Ill. App. 613; *Staal v. Grand St. & N. R. Co.*, 13 N. E. 624; *Robinson v. Marino*, 3 Wash. 440 (28 Am. St. Rep. 50).

Evidence of custom not competent for purpose of showing that appellant has not taken usual precautions. *Earl v. Crouch*, 16 N. Y. Supp. 770; *Iiwaco Ry. & N. Co. v. Hedrick*, 1 Wash. 446 (22 Am. St. Rep. 169).

Graves, Wolf & Graves, for respondent:

A general class of work was being done by appel-

lant, and the persons whose negligence is alleged to have caused respondent's injury were in active charge, not only having the right to direct and control this entire work, but to employ and discharge the men engaged thereon. Therefore these foremen were not fellow servants; but were acting in the stead of the appellant, and their negligence was the negligence of the master. *Louisville, etc., Ry. Co. v. Graham*, 24 N. E. 668; *Brabbitts v. Chicago, etc., Ry. Co.*, 38 Wis. 289; *Schultz v. Chicago, etc., Ry. Co.*, 4 N. W. 399.

Can it be said that the foreman was a fellow servant of respondent? This foreman was given a gang of men and a construction train, and was told that there was certain work at a certain place to do, and that he was to go and do it. He had absolute charge of the work within those limits; he had the right to hire and discharge men; to direct the running of the train; to put the men to work and to take them off, and to assign to each and every man his daily place of labor. He was no more the fellow servant of the respondent than the roadmaster was. In support of our contention we cite a few of the leading authorities. *Shearman & R., Negligence* (4th ed.) §§ 223, 226, 227; *Anderson v. Bennett*, 16 Ore. 515 (8 Am. St. Rep. 311); *Railroad Co. v. Keary*, 3 Ohio St. 211; *Lake Shore, etc., Ry. Co. v. Spangler*, 8 N. E. 467; *Palmer v. Railroad Co.*, 53 N. W. 397; *Lytle v. Railway Co.*, 47 N. W. 571; *Brown v. Sennett*, 68 Cal. 229 (58 Am. Rep. 8); *Taylor v. Railroad Co.*, 22 N. E. 876; *Nall v. Railway Co.*, 28 N. E. 184; *Darrigan v. Railroad Co.*, 52 Conn. 285 (52 Am. Rep. 590); *Baldwin v. St. Louis, etc., Ry. Co.*, 75 Iowa, 297 (9 Am. Rep. 479); *Hannibal, etc., Ry. Co. v. Fox*, 3 Pac. 323; *Con. Coal Co. v. Wombacher*, 24 N. E. 628; *Madden's Adm'r v. Railway Co.*, 28 W. Va. 618 (57 Am. Rep. 695); *Cooper v. Railway Co.*, 24 W. Va. 37; *Bloyd v. Rail-*

way Co., 22 S. W. 1089; *Hall v. St. Joseph Water Co.*, 48 Mo. App. 356; *Stephens v. Railroad Co.*, 86 Mo. 221; *Schroeder v. Railway Co.*, 18 S. W. 1094; *Missouri Pac. Ry. Co. v. Williams*, 12 S. W. 836; *Mason v. Railroad Co.*, 16 S. E. 699; *Moon's Adm'r v. Railroad Co.*, 78 Va. 745; *Denver, etc., Ry. Co. v. Driscoll*, 12 Colo. 520 (13 Am. St. Rep. 243); *Colorado Midland Ry. Co. v. Naylor*, 30 Pac. 250; *Louisville, etc., R. R. Co. v. Collins*, 2 Duv. 117 (87 Am. Dec. 486); *Van Amburg v. Railroad Co.*, 37 La. An. 650 (55 Am. Rep. 517); *Chicago, etc., Ry. Co. v. Lundstrum*, 20 N. W. 200; *Burlington, etc., Ry. Co. v. Crockett*, 26 N. W. 921; *Louisville, etc., R. R. Co. v. Bowler*, 9 Heisk. 866; *Railway Co. v. Collins*, 1 S. W. 883; *Cleveland, etc., Ry., Co. v. Brown*, 6 C. C. A. 145; *Reddon v. Union Pacific R. R. Co.*, 15 Pac. 264; *Boatwright v. Railroad Co.*, 25 S. C. 128; *Augusta Factory v. Barnes*, 72 Ga. 227; *Central Railroad v. DeBray*, 71 Ga. 406; *Daub v. Northern Pac. R. R. Co.*, 18 Fed. 632; *Ryan v. Los Angeles I. & C. S. Co.*, 44 Pac. 471.

It is the master's duty to provide a safe place for his employee to do his work, and to see that it is kept in a suitably safe condition, and this duty he cannot delegate to another so as to relieve himself from liability. *B. & O. R. R. v. Baugh*, 149 U. S. 386; *Hough v. Railway Co.*, 100 U. S. 213; *Northern Pac. R. R. Co. v. Herbert*, 116 U. S. 647; *Union Pacific R. Co. v. Jarvi*, 3 C. C. A. 435; *Louisville, etc., R. R. Co. v. Ward*, 10 C. C. A. 169; *Northern Pac. R. R. Co. v. Charless*, 2 C. C. A. 380; *Cunningham v. Railway Co.*, 7 Pac. 795; *Beeson v. Mining Co.*, 57 Cal. 20; *Mather v. Rillston*, 156 U. S. 397; *Northwestern Fuel Co. v. Danielson*, 6 C. C. A. 636; *Trihay v. Brooklyn Lead Mining Co.*, 11 Pac. 615; *Burke v. Anderson*, 69 Fed. 814; *Louisville, etc., R. R. Co. v. Ward*, 61 Fed. 927; *Union Pac. Ry. Co. v.*

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O'Brien, 16 Sup. Ct. 618; *Elledge v. National City, etc., Ry.*, 34 Pac. 720.

It is within the discretion of the trial court to require a remission of a portion of the verdict as a condition for the denial of a new trial. *Arkansas Cattle Co. v. Mann*, 130 U. S. 73; *Northern Pac. R. R. Co. v. Herbert*, 116 U. S. 646; *Southern Pac. Co. v. Tomlinson*, 33 Pac. 711.; *Davis v. Southern Pac. Co.*, 32 Pac. 646; *Collins v. Council Bluffs*, 35 Iowa, 433; *Lombard v. Chicago, etc., Ry. Co.*, 47 Iowa, 498; *Patten v. Chicago, etc., Ry. Co.*, 32 Wis. 536; *Whitehead v. Kennedy*, 69 N. Y. 469; *Doyle v. Dixon*, 97 Mass. 208 (98 Am. Dec. 84); *Marsh v. Union Pac. Ry. Co.*, 6 Am. & Eng. R. R. Cases, 359; *Little Rock, etc., Ry. Co. v. Barker*, 19 Am. & Eng. R. R. Cases, 201; *Zion v. Southern Pac. Co.*, 67 Fed. 500; *Reddon v. Union Pac. Ry. Co.*, 15 Pac. 267.

Evidence of general custom is always competent as going to the question of ordinary care in furnishing the employee safe appliances and a safe place of work. *Flynt Bldg. & Const. Co. v. Brown*, 67 Fed. 68; *Doyle v. St. Paul, etc., Ry. Co.*, 41 Am. & Eng. R. R. Cases, 378; *Kolsti v. Railway Co.*, 19 N. W. 655; *Kelly v. Railway Co.*, 9 N. W. 588; *Lafflin v. Railroad Co.*, 12 N. E. 599; *Loftus v. Ferry Co.*, 84 N. Y. 455 (38 Am. Rep. 533); *Martin v. Railway Co.*, 29 Pac. 645; *Murphy v. Greeley*, 15 N. E. 655; *Pennsylvania Co. v. Hankey*, 93 Ill. 580.

The opinion of the court was delivered by

GORDON, J.—The appellant is a railway corporation owning and operating a line of railway in this state. The respondent brought this action in the superior court of Spokane County to recover damages for an injury to his person, which damages he alleges were sustained by reason of appellant's negligence. The

complaint among other things, alleges that in the month of January, 1893, the appellant company was engaged in blasting rock near its track and transporting the same on flat cars to Mason Creek, a distance of about three miles, to be used in riprapping; that one Nolan was at said time and place in control and charge of said work and of the men engaged thereon, including the plaintiff, and that one Ryan was also foreman and as such had direction of said work in connection with Nolan; that on the 8th day of said month, while plaintiff was engaged drilling a hole into a certain large rock lying by the side of said railway, "the said rock was exploded by reason of the concealed load of giant powder therein. . . . That said Nolan at all times after said charge of powder was placed in said rock well knew that said charge of powder was concealed therein, and negligently and carelessly permitted same to remain therein, and without giving notice thereof and negligently and carelessly permitted plaintiff to drill the said hole therein, well knowing the danger incident thereto. That at the time of drilling said hole and at all the times before and up to the time of receiving injury herinafter mentioned, plaintiff was ignorant that said powder or other explosive was concealed in said rock and wholly ignorant that there was any danger in and about doing said work." As the result of said explosion plaintiff sustained severe bruises and wounds in and about the face, head, neck and left eye, as a result of which he was obliged to have his eye removed. Continuing the complaint alleges:

"That said injuries to plaintiff have continued ever since the time of receiving said hurts to the present time, and are permanent and will continue for the

whole of his natural life. That by the reason of the loss of said eye plaintiff is deformed and his face has become and is ugly and repulsive, and will so continue for the whole period of his natural life. That by reason of said injury plaintiff was prevented for a period of six months from following his ordinary avocation and business. That plaintiff's business was at the time of such injury and for a long time before had been and yet is that of a common laborer, and that he was used to earn in and about his said business two dollars per day, and that by reason of his injuries and loss of time for said period of six months has been damaged in the sum of four hundred dollars. That in consequence of said injuries plaintiff has suffered great pain and anguish, and will suffer great pain and anguish for the whole of his natural life. That by reason of the premises plaintiff has been damaged in the sum of forty thousand dollars."

The court overruled a demurrer to the complaint and appellant answered denying all the material allegations of the complaint and alleging affirmatively that whatever injury respondent sustained was sustained by reason of his own want of care and resulted from one of the risks of the employment which he voluntarily assumed. The trial resulted in a verdict in favor of respondent in the sum of \$7,500. Upon motion for a new trial the lower court found that said verdict was excessive to the extent of \$2,500, and ordered that that amount of the verdict should be remitted by respondent, and respondent having consented thereto, judgment was entered against appellant for the sum of \$5,000, from which it has appealed.

From the evidence it appears that the respondent was one of a gang of laborers comprising some sixty or more, all of whom were under the control of one Nolan who had absolute charge of this particular work, with authority to hire and discharge laborers and di-

rect when and where they should work and what labor they should perform. He also had a construction train under his charge and control for the purpose of transporting the rock from the place where it was taken out to the point on said creek where it was to be used. Plaintiff was a common laborer and had been in the employ of the appellant for about two months prior to the injury, but had been working at the place where the accident occurred for about two weeks only. More or less blasting was done in breaking up and removing the rock. It seems that the usual method pursued was to load a number of blasts or charges, then retire the men to a place of safety and fire the blasts; that a set of blasts was so fired on the afternoon of the 7th of January, 1893. The evidence clearly shows that at that time the respondent was not at the quarry or place where the blasts were fired, but was engaged in unloading rock from the cars at the creek some three or four miles distant; that on the following day he was at work in the quarry and, as we think the evidence sufficiently showed, was engaged in performing such labor as was required of him, and while assisting in the drilling of a hole in a rock (the respondent holding the drill while another workman used the hammer), an explosion occurred, resulting in the injuries to the respondent hereinbefore referred to. The evidence shows that the rock which respondent was engaged in drilling at the time of the explosion had the appearance of having come down the hill-side to the place at which it was lying when the work of drilling began; that it was partially covered with dirt and snow, and there was nothing "to indicate any appearance of a blast being in there."

John McDonough, a witness for the plaintiff, testified that on the day before the accident occurred and

just after a set of blasts had been fired and the men had returned to the quarry, he saw Nolan (the foreman) walk up to the rock in question and take hold of the fuse and "pulled it up and threw it over his shoulder."

"*Question*: What rock was it he pulled the fuse out of? *Answer*: The one next the track, the one the men was drilling when he was blowed up."

"*Q*. This was about four o'clock the day before he got hurt? *A*. Yes, sir, on the 7th."

On cross-examination he further testified:

"*Q*. You know you saw him (Nolan) right there? *A*. Yes, sir."

"*Q*. Walk and pick up the fuse? *A*. Yes, sir."

"*Q*. And pulled it out of the rock and threw it over his shoulder? *A*. Yes, sir."

Numerous errors have been assigned in the able brief of appellant's counsel, but those mainly urged and the only ones which we think are of sufficient importance to require special mention are as follows:

1. It is urged that the court erred in permitting the respondent, after the close of his testimony, to file an amended complaint. We do not think that the amendment was of such a character as to materially change the cause of action, or such as to occasion surprise or place opposing counsel at a disadvantage, and the ruling of the lower court in this respect falls within the holding of this court in *Hulbert v. Brackett*, 8 Wash. 438 (36 Pac. 264).

2. It is urged that the lower court having found that a portion of the damages assessed by the jury was in fact excessive, should have granted a new trial and not have directed a remission of a portion of the verdict. But this court has in numerous cases sanctioned the course pursued by the trial court. *Winter v. Shoudy*, 9 Wash. 52 (36 Pac. 1049); *Kohler v. Fairha-*

ven, etc., Ry. Co., 8 Wash. 452 (36 Pac. 253, 681); *Rigney v. Tacoma Light & Water Co.*, 9 Wash. 245 (37 Pac. 297).

3. The following instructions were requested by the appellant, and the refusal of the court to give them to the jury was excepted to:

"1. If you should find from the evidence that the injuries sustained by the plaintiff, if any such he did sustain, were received by him through the omission of the foreman Nolan to notify the plaintiff of the existence of an unexploded blast on the rock whereon the plaintiff was working, then I instruct you that such omission on the part of Nolan was the act of a fellow-servant and the plaintiff is not entitled to recover."

"3. If you find from the evidence that William Nolan had charge and control of the plaintiff and his co-laborers at the time of the happening of the injury to the plaintiff, and had the power to employ and discharge such laborers, and with authority to direct such laborers in the performance of their work, yet if you should further find that said Nolan was under the control, supervision and oversight of the roadmaster, or assistant roadmaster of the defendant, and that the work being done by the said Nolan and his gang of laborers was under the control, supervision and oversight of such roadmaster or assistant roadmaster, then I instruct you that in the matter of the details of the work being done by Nolan and his gang of laborers Nolan was a fellow-servant with the plaintiff and for the omission of the said Nolan in removing the unexploded blast or for his omission to notify the plaintiff of the particular danger which resulted in the injuries complained of, the defendant is not liable because such act or omission is the act of a fellow-servant of the plaintiff and for whose negligence the defendant is not chargeable, and you should find for the defendant."

Upon the question whether Nolan was the fellow-

servant of plaintiff and appellant liable for his negligence, the court charged as follows:

“If the said foreman was a fellow-servant with the plaintiff, then he cannot recover for any negligence of the said foreman. A fellow servant of the plaintiff in law is one working with him in the same common employment and for the same master, no difference in the position, wages and station of the two servants claimed to be fellow servants can affect this relation. So long as they are both working for a common master about a common business they are fellow servants, and one may not recover against the common master for an injury received from the negligence of the other. But if one servant is placed in the position of control, authority and direction over the whole work of the master, or over some general, separate or distinct branch thereof, and is empowered by the master to exercise the master's authority, control and direction over said work and over the other servants engaged in and about said work, and is vested with authority to direct where, when, how and in what manner such work shall be done and such other servants shall do said work, then such controlling employee is not a fellow servant with one working under him and thus subject to his direction and control. Such directing servant becomes for such work and towards such servants the vice principal of the master.”

It is urged that the giving of the instruction above set out and the failure to give those requested by appellant upon the subject constitute reversible error. An examination discloses a very great want of harmony among the authorities upon this subject, and we will not enter upon an extended analysis of them. This court in *Zintek v. Stimson Mill Co.*, 6 Wash. 178 (32 Pac. 997), held that,

“A yard boss of a lumber yard who has entire control of the yard with power to hire and discharge workmen, and to employ them under his orders, is a

vice principal, and not a fellow servant of the men who work under his control and superintendence.”

And upon a second appeal in the same case, in 9 Wash. 395 (37 Pac. 340), this proposition was reaffirmed. It is true, as urged by appellant, that Nolan was under the direction of the roadmaster of that division of the road upon which plaintiff was employed at the time of the accident. The headquarters of the said division were at the city of Spokane, a considerable distance from the place of the accident. It was the duty of Nolan to receive orders from the roadmaster, to whom he was also required to report; but it is also true, as already noticed, that Nolan had charge and control of the workmen at the place where this injury occurred, with authority to direct them in the performance of their work, and that he was the sole representative of the company at that place or within miles thereof. Not only did he have the right to direct them when and where they should perform services, but he had authority to discharge them and employ others. He also had control of the train employed in moving the rock. In the case of *Chicago, etc., Ry. Co. v. Ross*, 112 U. S. 377 (5 Sup. Ct. 184, 192), that court held that:

“A conductor of a railroad train, who has the right to command the movements of the train and to control the persons employed upon it, represents the company while performing those duties, and does not bear the relation of fellow-servant to the engineer and other employees of the corporation on the train.”

The court say:

“He is in fact, and should be treated as, the personal representative of the corporation, for whose negligence it is responsible to subordinate servants.

. . . If such a conductor does not represent the company,

then the train is operated without any representative of its owner."

We think that the principle there declared is applicable to the facts under consideration in this case. Here was a large and important piece of work undertaken by the appellant, requiring for its discharge the employment of a great number of men, considerable machinery and dangerous explosives. The managing officer or officers of the appellant had invested Nolan with full power to carry out the work and control the employees under him, and we think that in the discharge of these duties he became the representative of the company.

In *Brabbitts v. Chicago & N. W. Ry. Co.*, 38 Wis. 289, the court say:

"The functions of a railway company must be performed by numerous servants or employees, and among these there must necessarily be a gradation of authority, arranged with reference to the business of the company."

We think that in reason and upon the authority of the better considered cases, it must be held that it is a positive duty which the master owes to an employee not only to provide him with a reasonably safe place in which to work—so far as the nature of the work undertaken and the exigencies of the case will permit the same to be made reasonably safe—but also to observe such care as will not expose the employee to perils and dangers which may be guarded against by reasonable care and diligence; and where the performance of this positive duty is by the master entrusted to another, his failure to perform is the failure of the master. The discharge of this duty was in the case at bar entrusted by appellant to its foreman, Nolan. He was the superintending officer at the

place where the work was being performed, with full power and control over the plaintiff and all others connected in the active discharge of the work. Under the circumstances we think it follows that his negligence was the negligence of the company.

In *B. & O. Ry. Co. v. Baugh*, 149 U. S. 386 (13 Sup. Ct. 914, 921), the court say:

“Again, a master employing a servant impliedly engages with him that the place in which he is to work and the tools or machinery with which he is to work, or by which he is to be surrounded, shall be reasonably safe. It is the master who is to provide the place and the tools and the machinery, and when he employs one to enter into his service he impliedly says to him that there is no other danger in the place, the tools and the machinery, than such as is obvious and necessary. Of course, some places of work and some kinds of machinery are more dangerous than others, but that is something which inheres in the thing itself, which is a matter of necessity, and cannot be obviated. But within such limits the master who provides the place, the tools, and the machinery owes a positive duty to his employee in respect thereto. That positive duty does not go to the extent of a guarantee of safety, *but it does require that reasonable precautions be taken to secure safety*, and it matters not to the employee by whom that safety is secured, or the reasonable precautions therefor taken. He has a right to look to the master for the discharge of that duty, *and if the master, instead of discharging it himself, sees fit to have it attended to by others, that does not change the measure of obligation to the employee*, or the latter's right to insist that reasonable precaution shall be taken to secure safety in these respects.”

4. Appellant excepted to the giving of the following instructions:

“15. If you should find for the plaintiff under the instructions of the court, you will then proceed to

assess his damages, and in respect thereto I instruct you that plaintiff is entitled to recover, if at all, for all time which he may have lost for the period of six months after receiving such injury as a direct consequence of said injury as the same may appear by the evidence to be fairly and reasonably worth, not exceeding, however, the sum of \$400. He is also entitled to recover, if you find for him, for any and all pain and suffering which he may have endured up to the present time in consequence of such injury. In estimating pain and suffering the law fixes no exact measure of damages, it is left to the sound judgment of the jury to determine what will compensate therefor. The jury should not be governed by passion or prejudice or by whim and fancy in fixing an amount therefor, but should exercise a sound, reasonable and prudent judgment thereon. The plaintiff is also entitled to recover in this action, if you find for him, fair and reasonable compensation for any deformity resulting to him as a consequence direct and proximate of his injury, if any. And in determining what amount he should recover therefor, the jury may consider all the facts and circumstances in the case, and whether such injury is or will be permanent, and if not permanent how long it will continue. And plaintiff is also entitled to recover, if you find for him, such a sum as will fairly and reasonably compensate him for any loss of power or ability to earn money in and about his occupation and business for such a time subsequent to the period of six months after the date of receiving any injury which he may have received as the same will probably continue. The limit of plaintiff's recovery in any event is \$40,000."

The objection urged in the brief, as well as in the oral argument, goes only to the latter part of the instruction, and it is insisted that under the allegations of the complaint plaintiff is not entitled to recover anything by reason of his earning ability being impaired as a result of the accident, and that inasmuch as the complaint avers that the respondent was pre-

vented from following his usual business for the period of six months by reason of the injury sustained and in consequence thereof was damaged in the sum of \$400, that "it must be presumed that the earning power of the respondent had been restored at the expiration of the period of six months." We do not think that appellant is entitled to urge this objection. The exception to the charge below was: "Because the same does not properly state the measure of plaintiff's damages or recovery under the allegations of the complaint." The exception as taken goes to the entire instruction above set out. It is manifest that the greater portion of the instruction is unobjectionable and it is not complained of. It correctly stated the measure of plaintiff's recovery upon the question of plaintiff's loss of time for the period of six months after receiving the injury. It also laid down the proper rule for the assessment of damages by reason of pain and suffering which plaintiff may have endured. It also correctly informed the jury as to what compensation might be allowed to him because of any deformity resulting to him in consequence of the injury. In other words, there were four distinct phases of the case relating to the measure of plaintiff's recovery which are covered by the instruction, and we think it was the duty of appellant to indicate by its exception the particular portion of the instruction of which it complained.

Sec. 4 of the act of March 8, 1893, (Laws 1893, p. 112), provides: "Exceptions to a charge to a jury . . . may be taken by any party by stating to the court . . . that such party excepts to the same, specifying by numbers of paragraphs or otherwise the parts of the charge excepted to." It is the general rule that "exceptions to be of any avail must present

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distinctly and specifically the ruling objected to.” *Insurance Co. v. Sea*, 21 Wall. 158.

And this, we think, is as applicable to exceptions to a charge as to any other ruling. The exception in the form here taken was not calculated to direct the attention of the court to the particular portion of the charge complained of and it does not “specify the part of the charge excepted to” within the meaning of § 4, *supra*. See, also *Meeker v. Gardella*, 1 Wash. 129 (23 Pac. 837); *Maling v. Crummey*, 5 Wash. 222 (31 Pac. 600).

No reversible error appearing of record, the judgment and order appealed from are affirmed.

ANDERS, SCOTT and DUNBAR, JJ., concur.

[No 2293. Decided September 23, 1896.]

E. C. MILLION, *Respondent*, v. M. C. SOULE, *Appellant*

MUNICIPAL CORPORATION — POWER TO DISCOUNT ITS WARRANTS.

A municipal corporation cannot enter into a contract to discount its own warrants, and, in pursuance thereof, deliver in payment of the purchase price of land, warrants whose face value is in a larger sum than the purchase price agreed upon.

Appeal from Superior Court, Skagit County.—HON. HENRY MCBRIDE, Judge. Affirmed.

Kerr & McCord, for appellant.

Million & Houser, for respondent.

The opinion of the court was delivered by

SCOTT, J.—This action was brought to restrain the treasurer of Mount Vernon from paying certain warrants on the general fund, held by the defendant

Soule. A decree was rendered in favor of plaintiff, and Soule has appealed.

It appeared that one Jackson was the owner of some real estate which the town desired to purchase; that Jackson's price therefor was \$2,000; that the town did not have the money and that its warrants were at a discount. A deed of the real estate, to the town, was made by Jackson and deposited in the First National Bank of Mount Vernon to be delivered upon receipt of \$2,000 in money. One Moody, the cashier of the bank and agent of the appellant, agreed with the town authorities to pay said sum of \$2,000 in consideration of the receipt of \$2,300 in town warrants, and the same were issued accordingly, payment made and the deed delivered.

There is no substantial dispute as to these matters, but appellant contends that the effect of the proceedings upon the part of the town was an agreement to give \$2,300 in warrants for the real estate, and that the town could do this. We cannot agree therewith. The price for the real estate was \$2,000, and by virtue of the agreement the town issued \$2,300 in warrants for that sum.

We held in *Arnott v. Spokane*, 6 Wash. 442 (33 Pac. 1063), that a town could not discount its warrants. It is true there was a direct contract to that effect in that case, but if it could not be accomplished directly, it certainly should not be permitted by a subterfuge, and that is substantially what the transaction would be from appellant's standpoint, it being conceded that the price for the property was only \$2,000.

The action of the court in restraining the payment of the \$300 is affirmed.

HOYT, C. J., and ANDERS, DUNBAR and GORDON, JJ., concur.

Sept. 1896.] Opinion of the Court—GORDON, J.

[No. 2313. Decided September 23, 1896.]

THE STATE OF WASHINGTON, *on the Relation of Commercial Electric Light and Power Company, v. JOHN C. STALLCUP, Judge of the Superior Court of Pierce County.*

15	263
228	408
15	268
32	699
15	263
35	201
15	263
39	121

ORDER GRANTING INJUNCTION—EFFECT OF APPEAL.

An order granting a temporary injunction cannot be suspended by an appeal therefrom, as the statutory provisions authorizing the filing of a supersedeas bond (Laws 1893, p. 119, §§ 6, 7) have no application to orders granting injunctive relief.

Original Application for Mandamus.

Stiles & Stevens, for petitioner.

The opinion of the court was delivered by

GORDON, J.—An action was commenced by the city of Tacoma against the Commercial Electric Light and Power Company, defendant (relator herein), to obtain a perpetual injunction restraining and enjoining said light and power company from stringing electric wires on the streets of the plaintiff city. Upon hearing had the court issued a temporary injunction restraining the defendant therein from doing the acts threatened pending the litigation, and requiring the city to enter into a bond in the sum of \$5,000, conditioned to pay any damages defendant might sustain by reason of the temporary injunction. Thereupon defendant (relator herein) gave notice of appeal to this court from the order granting the temporary injunction, and also filed its cost bond upon appeal. Thereafter the defendant light and power company moved the respondent, as judge of the superior court in which said action was pending, to fix the amount of bond for

a stay of proceedings pending the appeal. The court denied the motion and refused to fix the amount of such bond in so far as it might "suspend the operation of the temporary injunction."

This is a proceeding for a writ of mandate directed to the respondent as judge, requiring him to forthwith fix the amount of said bond. A single question is presented, viz.: Is a temporary injunction operative during the pendency of an appeal from the order granting it? Upon behalf of the respondent it is insisted that the appeal was perfected by the giving of the cost bond; that "there are no proceedings on such order [an order granting a temporary injunction] and no process can issue thereon, and that there is nothing to be stayed." The general rule is thus stated in § 391 of Elliott's Appellate Procedure:

"Where a decree specifically forbids a party from doing a designated act he cannot by obtaining a supersedeas acquire a right to do the forbidden act. Thus, a supersedeas confers no right to do an act prohibited by a decree awarding an injunction forbidding the act. It is obvious that to assign to a supersedeas such force as would make it so operate as to give a party power to do what the decree prohibits would make it a remedy creating affirmative rights of a positive nature rather than a preventive order or writ. This would be to completely transform one remedy into another of an essentially different class. To adjudge that a supersedeas can create a positive and affirmative right would be, in effect, to annul the decree of the lower court before a hearing upon the merits is had, and this the policy of the law prohibits. The principles declared in analogous cases forbid that the merits of an appeal should be determined upon a preliminary application, and they forbid, also, that the judgment of the trial court should be nullified without a consideration of the merits in due course and upon full argument."

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"The general theory of injunctive relief, except so far as our code has changed the doctrine, is that some act is about to be done by the defendant which will result in such injury to the complaining party as cannot be compensated in damages that can be recovered in an ordinary action at law. If the party enjoined can, by appealing, go on and do the act which will result in the irreparable damage, compel the party who has obtained the injunction to seek his redress in an action for damages upon the appeal bond, there would seem to be no material advantage in obtaining an injunction in such case against such injurious act." *State v. Chase*, 41 Ind. 356.

In *Sixth Ave. R. R. Co. v. Gilbert E. R. Co.*, 71 N. Y. 430, it was held that :

"An appeal from a judgment restraining action on the part of defendant and a stay of proceedings thereon, does not affect the validity or effect of the judgment pending the appeal; defendant is not absolved from the duty of obedience to it, or permitted to do that which the judgment absolutely prohibits. The judgment, so far as it enjoins the defendant, needs no execution; it acts directly without process, and the stay only operates to prevent action on the part of plaintiff."

At page 433 the court say :

"It did not absolve them from the duty of obedience, and permit them to do that which the judgment absolutely prohibited, and the doing of which would, as adjudged by the court, cause irreparable mischief to the plaintiff, or an injury which could not certainly be compensated in damages."

See, also, *Klinck v. Black*, 14 S. C. 241; *Central Union Tel. Co. v. State*, 110 Ind. 203 (10 N. E. 922); *Slaughter House Cases*, 10 Wall. 273; *Merced Mining Co. v. Fremont*, 7 Cal. 130 (68 Am. Dec. 262); 2 High, Injunctions, § 1698.

Counsel for the relator concedes that the general

rule is that supersedeas bonds do not suspend temporary injunction orders, but he plants himself upon the statute of this state governing appeals, §§ 6 and 7, act of March 8, 1893, (Laws 1893, p. 119), and the cases of *State, ex rel. Reed, v. Jones*, 2 Wash. 662 (27 Pac. 452), and *State, ex rel. German-American, etc., Bank, v. Superior Court*, 12 Wash. 677 (42 Pac. 123). We have in the course of investigation examined a great many statutes, but we think that the distinction for which counsel contends—and which contention is supported to some extent by what is said in *State v. Superior Court, supra*,—is one of phraseology and not of principle. We have not been able to find any authority which supports the claim that an appeal from an order awarding a temporary injunction annuls the order and leaves the parties against whom it is directed as free to act as if the injunction had not been awarded.

Rule 93 of the supreme court of the United States provides :

“ When an appeal from a final decree, in an equity suit, granting or dissolving an injunction, is allowed by a justice or judge who took part in the decision of the cause, he may, in his discretion, at the time of such allowance, make an order suspending or modifying the injunction during the pendency of the appeal upon such terms as to bond or otherwise as he may consider proper for the security of the rights of the opposite party.”

It will be observed that this rule does not confer an arbitrary right, but reposes in the trial court a discretionary power. Here, it is asserted as an absolute right given by the statute. Were we to uphold the claim of relator it would be to read into the statute that “ in all cases of appeal from orders awarding temporary injunctions, the appellant may upon giving

the general bond provided by § 7, commit the acts forbidden by the order from which an appeal is taken." And, as there are no exceptions in the statute, it follows that unless it would be the right of a defendant to give a bond suspending the injunction pending an appeal, in all cases, it is a right in no case. Did the statute warrant such construction its constitutionality might well be doubted. To illustrate: It is one of the safeguards of the constitution that "private property shall not be taken for private use." Suppose in a given case a party or a corporation was proceeding to intrude upon the premises of another to cut down timber or remove and destroy property, claiming a right so to do, and that the owner, because either of the insolvency of the party asserting the right or because the damage threatened was not susceptible of definite ascertainment, or because of his unwillingness to part with his property for compensation or at all, should resort to equity to prevent the injury. The logic of relator's position is that if a temporary injunction issued, the defendant might, upon giving an undertaking on appeal, proceed to do the very acts which by injunction he was restrained from doing, and thereby the owner would be obliged to resort to the remedy upon the bond and be content with compensation in money. What becomes of the constitutional right of the defendant? It is vouchsafed to him that his private property shall not be taken for private use. For private purposes it may not be taken at all; for public purposes it may be taken only upon just compensation, and the question of whether the contemplated use be really public is by our constitution a judicial question.

It is perfectly manifest that these provisions of the constitution go for naught, if it is within the power

of the legislature to enable a party, under the guise of an undertaking upon appeal to disregard the restraints imposed by an injunctional order. And aside from the fact that under the constitution there are some rights of property which are sacred, and for an infringement of which the law does not require that the injured party shall accept compensation in money, it often occurs that the injury complained of is of such character as that adequate compensation in money cannot be made, and *that* circumstance in a given case might be the sole basis of equitable intervention.

"It may be that the tree threatened to be cut, is one which he values as an ornament to his dwelling, or one which, in his eyes, is sacred by its associations. There are some things which bonds will not cover and which cannot be estimated in dollars and cents, and if our law cannot fully protect the proprietor in cases like these, it but poorly earns the encomiums which are bestowed upon it." *De La Croix v. Villere*, 11 La. An. 39.

The remedy afforded by injunction is often sought to prevent irreparable injury which cannot be estimated in dollars and cents, and if the injunction is suspended while an appeal is pending, it might and doubtless would often follow that the mischief would be done which the object of the action was to prevent.

"Shade trees could be cut down, property removed out of the jurisdiction of the court beyond recovery, or any other wrong, intended to be prevented, perpetrated, so that when a final judgment or perpetual injunction were rendered, it would be vain and useless. The remedy sought by the process might thus become illusory, and success in the suit, followed by no benefit to the aggrieved party." *Green v. Griffin*, 95 N. C. 50.

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We think that the true rule is laid down in *Merced Mining Co. v. Fremont*, *supra*, viz:

“A stay of proceedings, from its nature, only operates upon orders or judgments *commanding some act to be done*, and does not reach a case of injunction.”

Section 8 of the act of 1893, *supra*, expressly provides that in all cases where a final judgment shall be rendered, wherein a temporary injunction has been granted and the party at whose instance such injunction was granted shall appeal from such judgment, such injunction shall remain in force during the pendency of the appeal upon giving the bond, etc. The enactment of this section strengthens the presumption that the general provisions of § 7 were not intended to embrace cases like the present. It seems plain that, if the general provisions of § 7 are applicable to appeals from orders granting temporary injunctions, they are equally applicable to the cases provided for by § 8; hence, why the necessity for enacting § 8?

It follows, we think, that the general language of § 7 of the act of March 8, 1893, *supra*, cannot, in view of the nature of injunctive relief, be held to suspend an injunction pending an appeal from an order allowing it. To hold that the legislature intended to authorize a party to commit the very act which it is the sole object of an action to prevent, in the face of an adverse order or decree standing unreversed, and remand his adversary to another forum there to seek in another form of action damages which he might be loath to accept, and which would oftentimes be difficult of ascertainment, and more often inadequate, upon the mere general terms of a statute that is inapplicable to the very nature of the case, would be unreasonable and do violence to the spirit, if not the

letter, of the law. While there are general expressions used in the opinion in *State v. Superior Court, supra*, which seem to justify the position of the relator herein, such general expressions cannot be considered as decisive either of that case or of the present one, and we think, upon mature consideration, that too broad a construction was there given the statute under consideration.

Of *State, ex rel. Reed, v. Jones, supra*, it is only necessary to say that under the statute in force, when that case was decided, no appeal was allowed from an order granting or denying a motion for a temporary injunction; hence the case cannot be considered of any authority upon the question here considered.

The writ prayed for must be denied.

SCOTT, ANDERS and DUNBAR, JJ., concur.

[No. 2004. Decided September 26, 1896.]

HENRY HOWARD, *Appellant*, v. MRS. E. A. DEVOL, *Respondent*.

JUDGMENTS—ACTION TO DETERMINE PRIORITY OF LIENS—PLEADING.

In an action to have a deficiency judgment adjudged as a prior lien on other realty of the mortgagee defendants, upon which an unsecured creditor had obtained a judgment lien, the complaint is demurrable when it fails to state that the mortgagee defendants were insolvent, or that any execution had been issued against them for the deficiency upon the mortgage foreclosure judgment and returned unsatisfied.

Appeal from Superior Court, Spokane County.—
Hon. JAMES Z. MOORE, Judge. Affirmed.

Richardson & Williams, for appellant.

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Opinion Per Curiam.

W. A. Lewis, for respondent :

Plaintiff does not allege his execution has been returned unsatisfied in whole or in part, nor does he allege that the sheriff has returned the original execution and order of sale on which the mortgaged premises were sold. This is a necessary allegation. *Miller v. Miller*, 7 Hun, 208; *McCullough v. Colby*, 5 Bosw. 477; *French v. Willet*, 10 Abb. Pr. 99; *Forbes v. Waller*, 25 N. Y. 430; *Renaud v. O'Brien*, 35 N. Y. 99; *Page v. Grant*, 9 Ore. 116; *Thomas v. Mackey*, 3 Colo. 393; *Randolph v. Daly*, 16 N. J. Eq. 317; *McElwain v. Willis*, 9 Wend. 548. This rule is unchanged by the code. *Crippen v. Hudson*, 13 N. Y. 161. Plaintiff must show he has exhausted his legal remedy before resorting to a court of equity. *Dunlevy v. Tallmadge*, 32 N. Y. 457; *Adsit v. Sanford*, 23 Hun, 45; *Emery v. Yount*, 7 Colo. 107; *Renaud v. O'Brien*, 35 N. Y. 99; *Bomberger v. Turner*, 13 Ohio St. 263 (82 Am. Dec. 438); *Beardsley Scythe Co. v. Foster*, 36 N. Y. 565.

Per Curiam.—Plaintiff brought an action against *W. A. Lewis* and his wife to foreclose a mortgage upon real estate. He obtained a judgment therein and a sale of the property was had, but not enough being realized to satisfy the mortgage, he brought this action to have the judgment for the deficiency adjudged a lien upon certain real estate belonging to the defendants in the other action, prior to the lien of a judgment obtained against them by the respondent. The court sustained a demurrer to the complaint and the plaintiff has appealed.

We find it unnecessary to consider many of the objections urged against the complaint, as we are of the opinion that the demurrer was well taken, for the reason that the complaint failed to state that the de-

defendants Lewis were insolvent, or that any execution had been issued against them for the deficiency upon the mortgage foreclosure judgment, and returned unsatisfied. Before the plaintiff could attack the respondent's lien upon the premises in question, or ask that it be subjected to his lien, it was necessary for him to make one or the other of these allegations.

Affirmed.

[No. 2046. Decided September 26, 1896.]

JAMES MASON, *Respondent*, v. WILLIAM MCGEE *et al.*,
Defendants, ULMER STINSON, *Appellant*.

ENFORCEMENT OF LOGGER'S LIEN — PLEADING — RECORD OF LIEN NOTICE
— EVIDENCE — REVIEW ON APPEAL.

The complaint in an action to foreclose a logger's lien is not demurrable on the ground that it does not allege, except as a conclusion of law, that anything was due the plaintiff, when it states that "under the terms and conditions of the said contract defendants became indebted to the plaintiff in the sum of three hundred three and 87-100 dollars."

An equity cause will not be reversed for technical defects in pleadings, where it has been fairly tried and decided in accordance with the proofs.

The fact that notice of a logger's lien was duly recorded is sufficiently proved by the introduction in evidence of the original notice with the auditor's certificate of record thereon and by testimony admitted without objection, that plaintiff had filed the notice for record in the proper auditor's office.

Appeal from Superior Court, Snohomish County.
—Hon. JOHN C. DENNEY, Judge. Affirmed.

Coleman & Hart, for appellant.

Coleman & Fogarty, for respondent.

Per Curiam.—This action was brought to foreclose

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Opinion Per Curiam.

a logger's lien upon a quantity of sawlogs. Judgment being rendered for the plaintiff, the defendant Stinson has appealed.

The first point raised is that the complaint does not sufficiently allege that anything was due the plaintiff. But this point is not well taken, for it is alleged that "under the terms and conditions of the said contract defendants became indebted to the plaintiff in the sum of three hundred three and 87-100 dollars;" and this was sufficient. Furthermore, the cause appears to have been fairly tried and we have repeatedly held in equity causes, where the proofs are sufficient, that we would not reverse them upon technical grounds going to the pleadings.

It is next urged that there was no sufficient proof of the recording of the lien notice. The original notice was introduced in evidence and upon it was what purported to be a certificate of its having been recorded by the auditor. But, independent of this, plaintiff testified without objection that he had filed the notice for record in the proper auditor's office, and this was sufficient.

The further objections urged by the appellant go to the findings of fact made by the court, on the ground that there was no testimony to sustain some of them, and that others were contrary to the testimony; but after an examination of the proofs, we are not disposed to set aside any of the findings, and as they were sufficient to sustain the decree that was rendered, the judgment is affirmed.

[No. 2116. Decided September 26, 1896.]

LESTER TURNER *et al.*, Appellants, v. SAMUEL CALDWELL, Sheriff, *et al.*, Respondents.

CHattel Mortgages — Removal of Property from County — Failure to Record Mortgage.

Under Gen. Stat., § 1649, which provides that when mortgaged personal property is removed from the county, it is, except as between the parties, exempted from the operation of the mortgage, unless, within thirty days after such removal, the mortgage is recorded in the county to which the property has been taken, one who acquires such property more than thirty days after its removal to another county is entitled to the possession thereof, when the mortgage had not been recorded in such county, although such subsequent purchaser had knowledge of the incumbrance and the property had been removed from the county of its location when mortgaged without the knowledge or consent of the mortgagee.

Appeal from Superior Court, Mason County.—HON. MASON IRWIN, Judge. Affirmed.

Kiefer & Balliet, for appellants.

John C. Kleber, for respondents.

Per Curiam.—The appellants' claim to the property in controversy in this action is founded upon a chattel mortgage which was executed in King county where the property was then situate. Said property was subsequently taken to Chehalis county and the mortgage was also recorded there. Thereafter it was removed from Chehalis county to Mason county, and remained there until levied upon by the sheriff by virtue of an execution in favor of respondent Hart, which levy was made long after the period of thirty days from the time of the removal of the horses to Mason county had expired. The mortgage was never filed for record in Mason county.

Appellants contend that the property was surreptitiously taken from Chehalis county to Mason county without their knowledge or consent. They furthermore offered to show that the respondents, at the time of the levy, knew of the existence of the mortgage. We are of the opinion that this was insufficient to sustain appellants' claim. The statute (§ 1649, Gen. Stat.) provides that when personal property is removed from the county, it is, except as between the parties to the mortgage, exempted from its operation unless within thirty days after such removal the mortgage is recorded in the county to which the property has been taken, etc.; and this without regard to any knowledge of the existence of such mortgage by the parties subsequently claiming the property. The obligation was upon the mortgagee to keep track of the mortgaged property and see that the same was not taken from the county where it was mortgaged, or that the mortgage lien was preserved as pointed out by the statute.

Affirmed.

[No. 2120. Decided September 26, 1896.]

EDWARD KENNAH, *Appellant*, v. R. J. HUSTON *et al.*,
Respondents.

FRAUDULENT REPRESENTATIONS — WHAT CONSTITUTES — PLEADING.

One who, in order to induce another to purchase certain land, represents that the purchase price is a given sum, and that he will take one half of the land if the latter will join with him in the purchase, is bound to so account to the latter that each will derive the same benefit from the contract of purchase, when the former had an agreement with the seller for the purchase of the property at a less sum than he represented to his co-purchaser that the land could be secured for.

A complaint charging that the owner of land, in order to effect a sale thereof to plaintiff, had conspired with another for the purpose of defrauding plaintiff by agreeing that the co-conspirator should represent and pretend to plaintiff that the purchase price of such land was more than the price actually placed thereon between the conspirators, does not state a cause of action against such land owner, when it does not show that he derived any benefit from such misrepresentation, nor that he said or did anything to lead plaintiff to enter into the contract. (DUNBAR, J., dissents.)

Appeal from Superior Court, King County.—Hon. RICHARD OSBORN, Judge. Reversed.

Stratton, Lewis & Gilman, for appellant.

W. H. Thompson, E. P. Edsen, John E. Humphries, and *James M. Epler*, for respondents.

The opinion of the court was delivered by

HOYT, C. J.—Appellant brought this action against two defendants. They separately appeared in the action and filed demurrers, which were sustained by the superior court. The allegations as to the two defendants were not the same and those as to each must be considered separately to determine whether or not they stated a cause of action.

As to defendant Huston it sufficiently appeared from the complaint that the other defendant Kakelty was the owner of a certain piece of real estate; that he placed it in the hands of Huston for sale at the price of \$4,000; that Huston, in order to induce the plaintiff to purchase the property, represented to him that the price at which Kakelty held it for sale was \$6,000, and as a further inducement agreed that he would take a half interest in the property, the plaintiff, for the consideration of \$3,000, to have the other half; that such defendant did not have the money to pay for his half and agreed that the plaintiff should pay

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\$4,000 and take title to two-thirds of the property, one-sixth thereof to be held as security for the repayment to him of the \$1,000 which the plaintiff should so pay over and above his half of the purchase price; that the plaintiff acted upon these representations, paid the \$4,000, and that the defendant Kakelty thereupon deeded the property, two-thirds to plaintiff and one-third to the defendant Huston.

The plaintiff contends that the allegations show that defendant Huston occupied such a relation to him in the transaction which led to the deeding of the property by Kakelty, that the benefits flowing therefrom must be mutually shared by said defendant and the plaintiff; while the claim of respondent Huston is that the allegations show no such relation; that all that is made to appear therefrom is the fact that he made certain representations as to the value of the property, and that such representations, under well settled rules, are simply matters of opinion and not such that misstatements in relation thereto constitute a cause of action.

That the expression of an opinion as to the value of property offered for sale will not furnish any ground for relief against the party expressing the opinion, is well settled; but in the case at bar what is alleged to have been done by the defendant Huston was more than the expression of an opinion as to the value of the property. It amounted to a statement by him that Kakelty was to receive \$6,000 for the property, and that he was willing to take a half interest in the property and pay one-half of the \$6,000 to Kakelty; and the terms upon which the plaintiff agreed to take an interest in the property were that it should be a joint purchase by himself and defendant Huston from the defendant Kakelty. This being so, the law will

not allow said defendant to derive any benefits from the contract which are not shared by the plaintiff.

While the circumstances surrounding this case are different from those which were under consideration in the case of *Shoufe v. Griffiths*, 4 Wash. 161 (31 Am. St. Rep. 910, 30 Pac. 93), the principle therein announced is clearly applicable here, and under it it must be held that the defendant Huston must so account to the plaintiff that each will derive the same benefit from the contract of purchase.

The only allegation by which it was sought to charge defendant Kakelty is contained in the thirteenth paragraph of the complaint, which is in the following language:

“That prior to the making of the said sale, the said defendant Huston and the said defendant Kakelty, conspiring together for the purpose of cheating and defrauding this plaintiff, had agreed that said defendant Huston should represent and pretend to the said plaintiff that the purchase price of the said lands was six thousand dollars (\$6,000), and in order to enable the said defendant Huston to obtain an interest therein without paying therefor anything.”

And in our opinion it is insufficient to warrant any recovery against him. It is true that it is alleged therein, in general terms, that he conspired with Huston for the purpose of defrauding plaintiff, but it is not shown that he in any manner derived or was to derive any benefit from any contract made by Huston with plaintiff; nor is it alleged that he said or did anything which led plaintiff to enter into the contract; nor is it shown that he in any manner aided or encouraged defendant Huston in his efforts to mislead or defraud the plaintiff. This being so, the bare allegation that he had agreed that said defendant Huston should make the misrepresentations is not

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Syllabus.

sufficient to make him liable to the plaintiff on account thereof.

The demurrer was rightfully sustained as to defendant Kakelty, but should have been overruled as to the defendant Huston. The cause will be remanded for further proceedings in accordance with this opinion.

SCOTT, and GORDON, JJ., concur.

DUNBAR, J. (*dissenting*).— I concur in what is said by Chief Justice HOYT, in regard to the responsibility of defendant Huston, but I think the allegation above quoted is sufficient to put defendant Kakelty upon his answer. This kind of a charge is frequently not susceptible of an allegation more specific than was made in this case. It is certainly not necessary to set out the conversation between the conspirators; for that is purely evidentiary. It is alleged that they agreed to defraud the plaintiff, and the manner of defrauding, nothing more, should be required. For this reason I dissent from the disposition of this case made by the majority. The judgment should be reversed as to both.

[No. 2240. Decided September 26, 1896.]

JOHN WOLVERTON, *Appellant*, v. B. B. GLASSCOCK *et ux.*,
Respondents.

JUDGMENT IN GARNISHMENT—RES JUDICATA—PROVINCE OF JURY.

In a suit upon a promissory note by the endorsee, in which the maker sets up the defense that the same had been paid in garnishment proceedings as a debt due the original payee, the action of the court in discharging the jury and finding for defendant is unwarranted, when there is conflicting evidence as to whether or not the endorsee had appeared in the garnishment proceedings.

Appeal from Superior Court, Spokane County.—
Hon. JAMES Z. MOORE, Judge. Reversed.

Jones, Belt & Quinn, for appellant.

Jones, Voorhees & Stephens, for respondents.

The opinion of the court was delivered by

DUNBAR, J.—Briefly stated, the appellant, John Wolverton, was the endorsee of two negotiable promissory notes executed by respondent Glasscock to appellant's father, W. M. Wolverton. The appellant brought an action on the notes against the maker and his wife, Annie W. Glasscock, the complaint containing the usual allegations. The answer of the defendants denied the endorsement of the plaintiff; denied the allegation that the notes had not been paid, and denied the reasonableness of the attorney's fee. But the answer which raised the issues which are material in this case was a further allegation that the defendants were garnishees in a suit brought by the Exchange National Bank of Spokane against W. M. Wolverton and Maggie Wolverton as defendants; that judgment was rendered against the defendant B. B. Glasscock as such garnishee, for the amount due on the said promissory notes sued on, and that the said B. B. Glasscock, in accordance with the demand of said judgment, had since paid and discharged said judgment so rendered against him as such garnishee, in full. The reply of the plaintiff was a general denial. Upon the trial of the cause the judge discharged the jury and decided the case adversely to the plaintiff, holding that the judgment in garnishment was a bar to the action.

It is urged by the appellant that the court erred in permitting any proof of the garnishee judgment or

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proceeding against Glasscock, because the appellant was not a party to the garnishee proceedings and is not bound by any judgment rendered therein. The defendant in the garnishment case, in his answer, alleged that he had been informed and believed that the notes sued upon had been assigned by the defendant in that action, W. M. Wolverton, to the plaintiff in this action, John Wolverton. It is insisted by the appellant that, under § 152 of the Code of Procedure, it was the duty of the defendant garnishee to apply to the court for an order to substitute the assignee, and that this not having been done he is bound to answer to the assignee for the debt.

We think that the mode provided by the statute is not intended to be exclusive, and that the attention of the court was sufficiently called by the answer to the fact of the assignment; and especially would this be irrelevant if the assignee actually appeared in the case, and this case must really be determined upon the proposition of whether or not the assignee, John Wolverton, appeared in the garnishment proceedings. It was upon the theory that he did appear that the court decided the case. But it seems to us that it was the duty and province of the jury to determine that question,—which was purely a question of fact,—rather than the court. The opinion of the court, which is a part of the record in this case, would have been a very good argument to have been presented to the jury by the defendant's attorneys. The court proceeds in this opinion to allege reasons tending to show that Belt, one of the attorneys for the plaintiff in this case, appeared in the garnishment case as attorney for John Wolverton, and the court concludes its opinion with the following words: "Now the court concludes from the evidence in this case that

the plaintiff was represented at the trial at Sprague and is concluded by the judgment there. The jury will be discharged." As we have before indicated, it was the province of the jury to reach conclusions from the evidence, and the case cited by the court, viz.: *Douthitt v. MacCulsky*, 11 Wash. 601 (40 Pac. 188), does not sustain the doctrine that in a case of this kind, where the testimony is conflicting, the court has a right to take the ascertainment of questions of fact from the jury and deprive the litigants of their constitutional right of trial by jury.

For this error alone the cause will be reversed and a new trial granted.

HOYT, C. J., and ANDERS, J., concur.

GORDON, J., concurs in the result.

[No. 2258. Decided September 26, 1896.]

JOHN L. MARSH, *Respondent*, v. MARTIN L. CAVANAUGH
et ux., *Appellants*.

BREACH OF CONTRACT TO CONVEY LAND — MEASURE OF DAMAGES.

The measure of damages for the breach of a contract to convey an undetermined piece of land is the amount of money paid upon such contract with interest thereon from the date of such payment.

Appeal from Superior Court, King County.—Hon. THOMAS J. HUMES, Judge. Affirmed.

E. D. Benson, for appellants:

Upon the point that plaintiff's recovery should be limited to the value of the property which he had contracted to purchase, and which defendants had failed to transfer, counsel cites *Cade v. Brown*, 1 Wash. 401;

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Tynan v. Dulling, 25 S. W. 465; *McIntosh v. Johnson*, 31 Pac. 450; *Cimmaron Land Co. v. Barton*, 33 Pac. 317; *Hogan v. Kyle*, 7 Wash. 595 (38 Am. St. Rep. 910); *Carver v. Tayler*, 53 N. W. 386; *Muenchow v. Roberts*, 46 N. W. 802; *Allen v. Mohn*, 49 N. W. 52; *Violet v. Rose*, 58 N. W. 216; *Nichols v. Freeman*, 11 Ired. 99.

Sapp & Lysons, for respondent:

The contract does not specify any particular land to be conveyed, therefore the rule of law contended for by appellant can have no possible application in the determining of this case. In fact many courts have held the contrary. *Morgan v. Bell*, 3 Wash. 554; *Bryant v. Hambrick*, 9 Ga. 134; *Davis v. Smith*, 48 Am. Dec. 285; *Hall v. Delaplaine*, 68 Am. Dec. 58, and note, p. 64; *Margraf v. Muir*, 57 N. Y. 159; *Foley v. McKee-gan*, 66 Am. Dec. 107, and note, p. 116; *Hammond v. Hannin*, 21 Mich. 387 (4 Am. Rep. 490).

The opinion of the court was delivered by

HOYT, C. J.—Respondent paid to the appellants \$250, and took from them a contract or bond in the following language:

“This indenture, made this 8th day of August, 1892, between Martin L. Cavanaugh and Mary A. Cavanaugh, his wife, of King county, Washington, the parties of the first part, & John L. Marsh, of the same place, the party of the second part,

Witnesseth, for and in consideration of the sum of two hundred and fifty (\$250.00) dollars lawful money of the U. S. to them in hand paid the receipt whereof is hereby acknowledged covenants and agrees to make a good and sufficient warrantee deed to the party of the second part or to his heirs or administrators to one lot in the plat of Duwamish City being the choice of any \$250 lot in said Duwamish City as laid off by

the parties of the first part and we agree for ourselves our heirs administrators and assigns to make a good and sufficient warrantee deed as above stated as soon as we get the town plat of Duwamish City recorded, or forfeit in gold coin the sum of five hundred dollars to the party of the second part. In witness whereof we the parties of the first part have set our hands and seals this eight day of August, 1892."

This action was brought to recover for an alleged breach of such contract.

The making of the contract and the breach of its conditions by the appellants were admitted or clearly established upon the trial. The only question upon which there was any substantial difference between the parties was as to the measure of damages to which the respondent was entitled on account of such breach. The superior court held that such measure of damages was the amount of money paid to the appellants, with interest thereon from the date of such payment, and in so doing correctly interpreted the contract. If such contract had been for the conveyance of a specific piece of property described therein, there might be force in the contention of appellants that it would have been necessary for the respondent to have alleged and proved the value of such piece of property, and that his recovery would have been limited to such value; but this contract not having provided for the conveyance of any specific piece of land, the principal invoked by the appellants has no application in determining the measure of damages. The receipt of the money and the making of a contract for the conveyance of an undetermined piece of property, and proof that there had been a refusal on the part of those bound by the contract to comply with its terms, would entitle the party who had paid the

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Argument of Counsel.

money upon the faith of such contract to recover it back with interest thereon from the date of payment.

The judgment will be affirmed.

SCOTT, DUNBAR and GORDON, JJ., concur.

[No. 2075. Decided September 28, 1896.]

ESLIE ATWOOD, *Appellant*, v. WILLIE ATWOOD *et al.*,
Respondents.

DELIVERY OF DEED — WHAT CONSTITUTES.

Delivery of a certain deed found among the papers of the grantor after his death cannot be presumed, when the only evidence thereof is that the grantor made the deed and intended that at some time the grantees therein named should become the owners of the land therein described, but there is nothing tending to show that he ever did anything in connection with the deed, or said anything in reference thereto, which clearly showed his intention that the title should pass from himself to the grantees named during his lifetime.

Appeal from Superior Court, Walla Walla County.—
Hon. WILLIAM H. UPTON, Judge. Affirmed.

Thomas & Dovell, for appellant:

That a deed shall pass title it must be delivered. But this does not require an actual manual delivery from the grantor to the grantee. Courts will look to the intention of the grantor and, as is that intention, the estate will pass or not. This intention may be manifested by either words or acts, or both. 5 Am. & Eng. Enc. Law, p. 447, and notes 3 and 5; 3 Washburn, Real Property (5th ed.), p. 805, and citations; 1 Devlin, Deeds, p. 262; *Bierer v. Fretz*, 4 Pac. 284; *Martin v. Flaharty*, 32 Pac. 287; *Glaze v. Insurance Co.*, 49 N. W. 595; *Davis v. Garrett*, 18 S. W. 113; *McGrath*

v. Hyde, 21 Pac. 949; *Jones v. Jones*, 6 Conn. 111 (14 Am. Dec. 35); *Adams v. Adams*, 21 Wall. 185; *Hibberd v. Smith*, 4 Pac. 481; *Toms v. Owen*, 52 Fed. 417; 4 Kent, Commentaries (13th ed.), p. 456; *Crawford v. Bertholf*, 1 N. J. Eq. 458; *Newton v. Bealer*, 41 Iowa, 334; *Garnous v. Knight*, 5 Barn. & Cr. 671; *Walker v. Walker*, 89 Am. Dec. 446; *Thompson v. Candor*, 60 Ill. 247; *Cline v. Jones*, 111 Ill. 568.

Chadwick, Fullerton & Wyman, for respondent Kenoyer:

To constitute a good delivery the deed must pass from without the control of the grantor, or, at least, his right to retain it must pass from him, and if the deed is left in such a manner that the grantor can recall or destroy it, change or modify it, there is no delivery. *Younge v. Guilbeau*, 3 Wall. 636; *Cook v. Brown*, 34 N. H. 460; *Baker v. Haskell*, 47 N. H. 479 (93 Am. Dec. 455); *Ball v. Foreman*, 37 Ohio St. 132; *Dearmond v. Dearmond*, 10 Ind. 191; *Stevens v. Stevens*, 23 N. E. 378; *Porter v. Woodhouse*, 59 Conn. 568 (21 Am. St. Rep. 131). The deed must be delivered in the life time of the grantor, for "there can be no delivery by a dead hand." *Jones v. Jones*, 16 Am. Dec. 39, notes; *Fisher v. Hall*, 41 N. Y. 423; *Jackson v. Leek*, 12 Wend. 107; *Herbert v. Herbert*, Breese, 354 (12 Am. Dec. 192); *Fay v. Richardson*, 7 Pick. 91; *Wiggins v. Lusk*, 12 Ill. 132. "The general rule, undoubtedly, is that where a deed remains in possession of the grantor to be delivered and take effect after his death, the deed is void for want of delivery during his life time." 1 Devlin, Deeds (1st. ed.), § 279; *Miller v. Murfield*, 44 N. W. 540; *Stone v. French*, 37 Kan. 145 (1 Am. St. Rep. 237); *Anderson v. Anderson*, 24 N. E. 1036; *Ireland v. Geraghty*, 15 Fed. 35; *Fain v. Smith*, 14 Ore. 82.

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(58 Am. Rep. 281); *Provart v. Harriss*, 36 N. E. 958; *Huey v. Huey*, 65 Mo. 689.

The grantor, after signing the deed in question, continued to reside on the premises described, and continued to hold the deed in his possession, and exercised exclusive control over it and its place of deposit. This is conclusive against any contention of delivery, either actual, constructive, or even by intent. *Hawkes v. Pike*, 105 Mass. 560 (7 Am. Rep. 554); *Elmore v. Marks*, 39 Vt. 538; *Samson v. Thornton*, 3 Metc. 275 (37 Am. Dec. 135); *Maynard v. Maynard*, 10 Mass. 456 (6 Am. Dec. 146); *Bailey v. Bailey*, 7 Jones (N. C.) 44; *Payne v. Powell*, 5 Bush, 248; *Davis v. Williams*, 57 Miss. 843; *Benneson v. Aiken*, 102 Ill. 284 (40 Am. Rep. 592); *Byars v. Spencer*, 101 Ill. 429 (40 Am. Rep. 212); *Stinson v. Anderson*, 96 Ill. 376; *Jones v. Loveless*, 99 Ind. 317; *Miller v. Lullman*, 81 Mo. 311. *Goodlett v. Kelly*, 74 Ala. 213; *Ward v. Ward*, 2 Hayw. (N. C.) 226.

Edmiston & Miller, for respondents Whitaker *et al.*:

Courts of equity will take no notice of the intent of the grantor to deliver the deed until the fact is established that he did some act, or made some declaration which he intended should constitute a delivery, and by which he intended to divest himself of title. The act, or words, must be present, and it must be shown that the grantor intended said word or act to take the place of an actual delivery. It is never sufficient to show that the grantor intended to do something in the future, which should constitute or take the place of a delivery. A delivery can never be predicated upon the intention of the grantor so long as the deed remains in his possession under circumstances showing that he retains control of the same with the inten-

tion of doing something more with it. 5 Am. & Eng. Enc. Law, p. 445; *Fisher v. Hall*, 41 N. Y. 423; *Baker v. Haskell*, 93 Am. Dec. 455; 3 Washburn, Real Property (4th ed.), pp. 289, 290; *Anderson v. Anderson*, 24 N. E. 1036; *Hibberd v. Smith*, 4 Pac. 473; *Oliver v. Oliver*, 36 N. E. 955; *Davis v. Ellis*, 19 S. E. 399; *Stillwell v. Hubbard*, 20 Wend. 44; *Brown v. Brown*, 66 Me. 316. To constitute a delivery the grantor must part with the possession of the deed or the right to retain it. *Younge v. Guilbeau*, 3 Wall. 636; *Maynard v. Maynard*, 10 Mass. 456 (6 Am. Dec. 146); *Lang v. Smith*, 17 S. E. 213; *Benneson v. Aiken*, 102 Ill. 284 (40 Am. Rep. 592); *Ireland v. Geraghty*, 15 Fed. 35. The only infallible test of delivery is the fact that the grantor has divested himself of all dominion and control over the deed. *Cook v. Brown*, 34 N. H. 460; *Byars v. Spencer*, 40 Am. Rep. 212; *Huey v. Huey*, 65 Mo. 689; *Fain v. Smith*, 14 Ore. 82 (58 Am. Rep. 281); *Provart v. Harriss*, 36 N. E. 958.

The opinion of the court was delivered by

Horr, C. J.—The fact upon which the rights of the parties in this action depends is as to whether or not a certain deed found among the papers of the grantor after his death had been so delivered in his life time that it became operative, and conveyed the title to the land therein described to the grantees therein named.

The cause was tried before a referee who made findings of fact upon which he founded a conclusion of law to the effect that the deed had been so delivered. Exceptions having been taken to the findings of the referee, the superior court set aside such findings and made new findings of fact, and thereon found as a

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conclusion of law that the deed had not been delivered so as to become operative.

A careful examination of all the evidence introduced upon the trial satisfies us that the findings made by the superior court were warranted by such evidence, and in our opinion but one conclusion of law could be drawn therefrom, and that was the one which the superior court drew when it found that the deed had not been delivered. Not only are we satisfied that the findings by the superior court fully support its conclusion as to the law, but in our opinion the findings of fact made by the referee failed to support his conclusion of law drawn therefrom, and were such that the proper conclusion would have been that the deed had not been delivered.

In coming to these conclusions we have not lost sight of the able argument and large array of authorities contained in the brief of appellant, to the effect that the delivery of a deed does not necessarily require any formal act on the part of the grantor; that it is often a question of intention; that a deed may become operative while the manual possession is retained by the grantor. But in such cases, before the court can find a delivery, the intention to consummate the transaction so as to fully vest the title in the grantee must be clearly shown, and neither the findings of fact by the referee nor by the superior court, nor the evidence in the case, satisfies us that the grantor in the deed under consideration ever did anything with the intention that by doing it he had so delivered the deed as to make it presently operative. That which can be gathered from the evidence construed most strongly in favor of the plaintiff, is that the grantor made the deed and that he intended that at some time the grantees therein named should be-

come the owners of the land therein described; but there is nothing which even tends to show that he ever did anything in connection with the deed or said anything in reference thereto which clearly showed his intention that the title should pass from himself to his children during his life time. Nor was there anything which tended to show that the deed had been delivered to any person *in escrow* to take effect after the death of the grantor. Such being the state of the evidence, no case has been cited by the plaintiff which would justify us in finding that the deed had been delivered during the life time of the grantor.

The judgment and decree will be affirmed.

ANDERS, DUNBAR, SCOTT and GORDON, JJ., concur.

15	290
15	560
15	290
18	606

[No. 2209. Decided September 28, 1896.]

JOHN DONNERBERG, *Respondent*, v. HARRIET OPPENHEIMER *et al.*, *Defendants*, W. R. NEWPORT *et al.*, *Appellants*.

NEGOTIABLE INSTRUMENTS — GUARANTY — INDORSEMENT — PRINCIPAL AND SURETY — DISCHARGE OF SURETY — PRESENTMENT OF CLAIMS AGAINST ESTATE — ESTOPPEL.

The failure to present a claim to the trustees of a testator's estate within one year after their appointment and qualification under the will is no bar to an action on the claim when no notice to present claims has ever been published by the trustees.

Where it has been stipulated between parties to an action that prior to its commencement plaintiff had duly presented the note in issue to defendants and demanded payment of them, as the personal representatives of certain decedents who had guaranteed its payment, no question can be raised on the trial as to the want of an affidavit of the justness of the claim.

That a promissory note was obtained after maturity without any

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consideration is no defense to an action thereon by the holder, when the note had been transferred before maturity to parties other than plaintiff, who were holders in good faith and for value, and plaintiffs' title had been acquired through such *bona fide* holders.

A written guaranty upon the back of a promissory note signed by the payee and another constitutes an endorsement of the note with an enlarged liability when the note has been transferred to other parties.

The failure to present a claim under a contract of guaranty to the representatives of the estate of the principal guarantor does not effect a discharge of a surety on the guaranty, inasmuch as such omission cannot be construed as a release of the principal by the affirmative act of the creditor.

Under Code Proc., §§ 704, 1042, providing for the survival of certain causes of action, the death of a surety before the principal will not operate as a discharge of the former's liability.

Appeal from Superior Court, Spokane County.—
Hon. NORMAN BUCK, Judge. Affirmed.

Jones, Voorhees & Stephens, for appellants.

Jones, Belt & Quinn, for respondent.

The opinion of the court was delivered by

SCOTT, J.—One Winnie executed a note to Solomon Oppenheimer, and said Oppenheimer and E. J. Brickell guaranteed the payment of the note, waiving demand, protest, etc., by a written guaranty upon the back thereof, and Oppenheimer, before the maturity, sold the note to one Dekum, and it was thereafter transferred several times and was finally purchased by the plaintiff, who brought this action upon the guaranty against the representatives of said guarantors, they both having died, to collect a balance due upon the note.

There is no controversy as to the facts in the case. Oppenheimer's estate had been duly settled through the probate court and the claim not having been pre-

sented, the court held that said estate was not liable. Brickell, by his will, appointed the appellants, Newport, Dyer and Cheney, as trustees of his property, directing them to manage and settle the estate without the intervention of the court. The will was proven and said trustees were managing and settling the estate without the intervention of the probate court at the time of bringing this action. No notice to present claims against said estate was published. It was agreed also that Oppenheimer was principal in said guaranty and that Brickell was surety.

Appellants' first contention is that plaintiff's cause of action was barred in consequence of a failure to present the note for payment within one year after they qualified as trustees of Brickell's estate. They contend that the statute requires claims to be presented against estates being settled in such a manner, as well as those regularly administered or settled in the probate court. But conceding this for the purposes of this case only, and not deciding it, it would also have been necessary for the trustees to have published a notice to present claims and not having done so, it would not be barred by any failure to present it.

It further appears that the note was presented for payment after the expiration of one year and that payment was refused and that the action was not brought until some four months after such presentation, and appellants contend that the plaintiff cannot recover (1) because there was no affidavit of the justness of the claim, etc., and (2) in consequence of the delay in bringing the suit. But appellants stipulated that prior to the commencement of the action plaintiff had duly presented said note and demanded payment, and therefore cannot now raise the objection

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that there was no affidavit as to the justness of the claim. Nor is the position, in regard to the delay in bringing the action, well taken, for there was no obligation upon the plaintiff to present the note at all as said above.

It is next contended that the plaintiff took the note subject to all defenses, and that the guaranty was executed some time after the execution of the note and was executed by Brickell without any consideration, etc., and that the complaint alleges that the plaintiff obtained the note by assignment and that no endorsement of the note was pleaded or proven. It appears, however, that the note had been transferred, before its maturity, to several parties other than the plaintiff, who were holders in good faith and for value, and the plaintiff, although obtaining the note after maturity, would take as good a title thereto and stand in as good a position as such prior holders. *Bank of Sonoma County v. Gove*, 63 Cal. 355 (49 Am. Rep. 92); 1 Daniel, Neg. Instruments, § 726 a.

As to the transfer of the note by endorsement, the written guaranty was set forth in full as being upon the back of the note and signed by the guarantors, and under the authorities this constituted an endorsement of the note with an enlarged liability. *Robinson v. Lair*, 31 Iowa, 9; *Heard v. Bank*, 8 Neb. 10; *Crosby v. Roub*, 16 Wis. 616 (84 Am. Dec. 720); *Heaton v. Hulbert*, 3 Scam. 489.

It is further contended that the guaranty being joint, the release of one joint obligor released the other, and that the release of the principal discharged the surety, and as the Oppenheimer estate had been released, the effect of it was to release the Brickell estate also. But this rule only applies where the discharge is brought about by some affirmative act upon

the part of the creditor and there was none in this case; all that is claimed is a failure to present the note against the Oppenheimer estate. *Dye v. Dye*, 21 Ohio St. 86 (8 Am. Rep. 40); *Gage v. Bank*, 79 Ill 62; *Davis v. Graham*, 29 Iowa, 514; *Darby v. Bank*, 97 Ala. 643 (11 South, 881); 2 Daniel on Neg. Inst. § 1339.

It is next urged that when the surety dies and the principal survives, that the surety's estate is absolutely discharged, and the survivor only is liable. But this is not so under our statutes (Code Proc., §§ 704, 1042), which provide that in certain cases, which would include this one, where actions could have been maintained against the party if living, that the same may be prosecuted against his representatives.

Finding no error, the judgment is affirmed.

HOYT, C. J., and DUNBAR, ANDERS and GORDON, JJ., concur.

[No 2236. Decided September 28, 1896.]

THE CITY OF TACOMA, *Respondent*, v. GERMAN-AMERICAN SAFE DEPOSIT AND SAVINGS BANK, *Appellant*.

BANKS AND BANKING — CITY WARRANTS DEPOSITED AS CASH — ESTOPPEL.

In an action by a city to recover from a bank a sum of money alleged to have been deposited by its treasurer, the answer of the bank is demurrable, when it admits that it had given credit for the amount claimed as money received by it from the city treasurer, but alleges as a defense that no money had in fact been deposited, but merely city warrants which were void, the answer, however, making no offer to return the warrants or to account for them in any way.

A bank is estopped to dispute its indebtedness to a city, where at various times during a period of two years it has given a city credit for money deposited, and entered the amounts in a pass book de-

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livered to and kept by the city treasurer, although in fact city warrants instead of money had been actually received by the bank, when it has allowed the city to transact its business upon the assumption that the money in question was on deposit, and no attempt was made by the bank to avoid the transaction for a period of a year and a half after the last of such deposits had been made.

Appeal from Superior Court, Pierce County.—Hon. EMMETT N. PARKER, Judge. Affirmed.

B. F. Heuston, and *T. W. Hammond*, for appellant.

John Paul Judson, and *W. H. H. Kean* (*Jame Wick-ersham*, of counsel), for respondent.

Per Curiam.—This action was brought by the city against the respondent bank to recover a balance due of moneys deposited by a former city treasurer at various times from April, 1892, to April, 1894, the amount thereof being something over \$80,000. Some \$22,000 of this was subsequently paid to the city upon warrants, by its treasurer McCauley who had succeeded Boggs, the former treasurer. The defendant answered admitting that it had given credit for the amount claimed as money received by it from the city treasurer, and had entered the same in a pass book which was delivered to and kept by the treasurer. But as a defense it was alleged that no money in fact had been deposited, and that said warrants were void, etc. But no offer was made to return the warrants and they were not accounted for in any way. Plaintiff demurred to the answer, and the court sustained the demurrer, and, upon the failure of the defendant to amend, judgment was rendered for the plaintiff.

We think the demurrer was rightly sustained. It appears from the pleadings that there was no attempt upon the part of the defendant to avoid the transaction until October, 1895; that it allowed the city to trans-

act its business upon the statement or assumption that the money in question was on deposit with the defendant. One treasurer had gone out of office and another succeeded him. Furthermore, the defendant had no right to accept the warrants as it alleges it did accept them, and should not at this time be permitted to interpose the defense set up. It was also incumbent upon the defendant to return or offer to return the warrants.

Affirmed.

15	296
18	574
15	296
28	637
28	638
15	296
41	240

[No. 2242. Decided September 28, 1896.]

THE CITY OF TACOMA, *Respondent*, v. HENRY KRECH,
Appellant.

CONSTITUTIONAL LAW—SPECIAL LEGISLATION—ORDINANCE AGAINST
BARBERS PURSUING CALLING ON SUNDAY.

A legislature having no authority under the constitution to pass laws partaking of the character of special legislation, it cannot delegate such power to a city council.

An ordinance of a city prohibiting barbers from pursuing their calling on Sunday for compensation, is void as an act of special legislation, as it singles out one class of people and imposes restrictions upon them which are not imposed on other citizens alike.

Appeal from Superior Court, Pierce County.—HON. EMMETT N. PARKER, Judge. Reversed.

O'Brien & Robertson, for appellant.

John Paul Judson, and *W. H. H. Kean* (*Stacy W. Gibbs*, of counsel), for respondent.

Per Curiam.—The appellant was convicted in the municipal court for violating a city ordinance of the

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city of Tacoma, which ordinance prevents barbers from pursuing their calling, from shaving or doing any work in connection with their trade, for compensation, on Sunday. Appeal was taken to the superior court of Pierce county. On the trial appellant was again convicted, and from the judgment of that court this appeal is taken.

This judgment is attacked for various reasons by the appellant, but with the view we take of his last contention, viz., that the law is special and is obnoxious to the provisions of our constitution in relation to special legislation, a discussion of the other propositions will not be necessary. One class of people is singled out by this law, while other laboring people in different characters of employment are allowed to prosecute their work. Conceding, for the purpose of this case, the right of the legislature to pass a law restricting or forbidding manual labor on Sunday, yet, under the provisions of our constitution, the restriction must be imposed alike upon all residents of the state or the effect of the law would be to work privileges and immunities upon one class of citizens which did not equally belong to all citizens. If this law is valid, then the legislature would have the right to prohibit farm labor on Sunday; to prohibit working by printers on Sunday; to prohibit nine-tenths of the employments which citizens usually engage in in this country, and leave the other one-tenth of the people to pursue their vocations. This would plainly be granting privileges and immunities to one class which did not belong equally to all citizens. The object of the constitution was to prohibit special legislation and substitute in its place a general law which bore on all alike.

It seems to us that the ordinance in question is

special legislation within the meaning of the constitution, and of course if the legislature had no right to pass such a law it could not delegate such power to a city council. This view is sustained by *Ex parte Jentzsch*, 44 Pac. (Cal.), 803; *Keim v. Chicago*, 46 Ill. App. 445; *Pasadena v. Stimson*, 91 Cal. 238 (27 Pac. 604); *State v. Granneman*, 33 S. W. (Mo.) 784, and *Eden v. People*, 43 N. E. 1108 (referred to on page 437, Vol. 2, Central Law Journal).

It is true there have been some decisions, notably in the state of New York, holding the contrary view, but we are satisfied with the reasoning of the cases cited, and therefore hold the ordinance to be unconstitutional.

The judgment will be reversed and the cause dismissed.

[No. 1989. Decided September 30, 1896]

THE STATE OF WASHINGTON, *on the Relation of John G. Niggle, Respondent*, v. WILLIAM W. KIRKWOOD, *Appellant*.

QUO WARRANTO—WHEN LIES—REMOVAL FROM CITY OFFICE—SUFFICIENCY OF CHARGES—REVIEW OF PROCEEDINGS.

Where a public officer of a city has been removed from office upon certain charges and findings made against him by the mayor, who has appointed a successor, the proper remedy for the officer removed is by an information in the nature of a *quo warranto*.

The removal by the mayor of a city of a police commissioner is warranted, when it is charged and proved that as such officer he attempted to interfere with the administration of the police department in the enforcement of the law against prostitution, by seeking to influence the chief of police to permit the occupation of certain premises for immoral purposes, which the mayor had ordered abated

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as a nuisance, and had attempted to remove the chief of police upon failing to influence him, the commissioner being interested as owner in certain of the buildings so occupied for immoral purposes, from which the mayor had directed the objectionable occupants to be removed.

Although charges preferred against a public officer by the mayor of a city may be somewhat indefinite, objection thereto on that ground cannot be raised in the superior court, when the person removed from office had gone to trial on them before the mayor without objection and without any motion to make more specific and certain.

Appeal from Superior Court, King County.—Hon. RICHARD OSBORN, Judge. Reversed.

W. T. Scott, and *Frank A. Steele*, for appellant.

The opinion of the court was delivered by

DUNBAR, J.—The respondent was removed from the office of police commissioner by the mayor of the city of Seattle, and appellant Kirkwood was appointed to fill the vacancy caused by the removal. Subsequently the respondent, as relator, commenced an action by information in the nature of a *quo warranto* against the appellant to oust him from the office and reinstate himself. The court refused to hear evidence to impeach the findings of the mayor, took the case from the jury, and found for the relator on the pleadings, upon the ground that the charges and findings were insufficient to support the removal of the relator. The appellant answered the information, denied the intrusion and ouster, and alleged affirmatively the procedure by which the respondent was removed from office and the appointment of the appellant to fill the vacancy.

The first proposition argued by the appellant is that the court had no jurisdiction to determine the sufficiency of the charges or findings, or to inquire into

the materiality of the grounds for respondent's removal, upon information in the nature of a *quo warranto*, because it is a collateral attack upon the judgment of a tribunal invested by law with exclusive original jurisdiction to hear and determine that particular matter. The appellant admits that his objection falls under the ban of the decision of this court in *State, ex rel. Heilbron, v. Van Brocklin*, 8 Wash. 557 (36 Pac. 495), but vigorously attacks the grounds of that decision. We have re-examined that case. It was presented by able counsel and carefully considered by the court, and without again entering into a discussion of the questions involved, we are satisfied with the decision therein rendered, and the rule announced that the proper remedy of the relator was by *quo warranto* instead of *certiorari*.

The second contention of appellant, however, viz., that the charges were sufficient to support the removal of relator, we think must be sustained. These charges may have been somewhat indefinite, but no motion was made to make them more definite or certain. No objection was made to them in any way. The appellant went to trial upon the complaint as it was, and the issues were found against him, and we think it is too late for him now to raise the objection that the complaint was indefinite or not specific. We think that there is sufficient in the charges preferred by the mayor and the findings made to sustain the verdict. It is charged that the relator was interested and part owner in certain buildings which were occupied for immoral purposes; that their only value arose from such occupation; that under the direction of the mayor of the city the police, in the enforcement of the law against such immoral practices, were proceeding to abate the nuisance by driving out these objectionable

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occupants; that the relator from time to time attempted to interfere with and change the administration of the police department as to the aforesaid matter and sought to influence the chief of police to permit the occupation of these premises for these practices and to cease interference with the practices carried on there; that he attempted to remove the chief of police for the reason that he had been unable to influence the chief to permit such practices, and many other charges of like character. The complaint is too long for review at length, and, as we have before said, is somewhat discursive and indefinite; but we think sufficient can be gathered from the complaint to place the relator upon trial for acts which were inconsistent with the duties of a public officer. For this reason the judgment will be reversed and the cause remanded with instructions to proceed in accordance with this opinion.

Hoyt, C. J., and Scott and Gordon, JJ., concur.

[No. 2090. Decided September 30, 1896.]

JOHN C. MALBON, *Respondent*, v. JAMES A. GROW *et al.*,
Defendants, FIRST NATIONAL BANK OF COLFAX, *Appellant*.

MORTGAGES — RECORD — INDEX — SUFFICIENCY.

An index to a record of mortgages which contains the name of mortgagor and mortgagee and a description of the land to the extent that it gives, under three columns, headed respectively "Sec. Lot," "Twp. Block" and "R," the figures "35," "7," and "36" respectively, is sufficient to constitute constructive notice of an incumbrance upon sec. 35, twp. 7, range 36 in the county of the place of record, under the provisions of the law requiring records of deeds and mortgages to be properly indexed in order to constitute constructive notice.

15	301
41	528

Appeal from Superior Court, Walla Walla County.—
Hon. WILLIAM H. UPTON, Judge. Affirmed.

Eugene K. Hanna, Thomas H. Brents, and Wellington Clark, for appellants:

Few statutes are similar to ours in making the index an essential part of the record, and consequently but few decisions throwing light upon the point in controversy have been rendered. These, however, hold that "the description of the property" is an essential part of the index; that the description must be "correct" and that the searcher may rely upon its being so and need not look beyond it. *Noyes v. Horr*, 13 Iowa, 570; *Scoles v. Wilsey*, 11 Iowa, 261; *Howe v. Thayer*, 49 Iowa, 154; *Breed v. Conley*, 14 Iowa, 269 (81 Am. Dec. 485); *Shove v. Larsen*, 22 Wis. 142; *Lombard v. Culbertson*, 59 Wis. 433. See, also, 1 Story, Eq. Jur., § 404; 2 Pomeroy, Eq. Jur., § 650.

George T. Thompson, for respondent.

The opinion of the court was delivered by

DUNBAR, J.—Respondent Malbon brought this suit to foreclose a mortgage executed by Grow and wife to him in 1891, on real estate in Walla Walla county, making Rogers, Buff and wife and the First National Bank of Colfax, parties to the action by reason of their claiming some interest in the same. After the execution and filing of the mortgage from Grow to Malbon, appellant and defendant Rogers obtained mortgages to the same land and had the same placed of record in Walla Walla county.

It is admitted that the respondent's mortgage had been transcribed in the proper public record before the execution of appellant's mortgage but it is claimed by

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appellant that the respondent's mortgage had not been indexed as required by law in order to constitute the record of its constructive notice to the appellant of its existence. The index, so far as the description of the land is concerned, was as follows :

Description.	Sec. Lot.	Twp. Block.	R.
Land.	35	7	36

Appellant and defendant Rogers answered, setting up the execution and recording of their mortgages, pleading the lack of constructive notice of respondent's mortgage by reason of the want of a proper index to the same and asking that their mortgages be declared a first lien on the land. The court found that the law had been complied with so far as the index was concerned and that the appellant and defendant Rogers were not innocent purchasers, and gave judgment of foreclosure decreeing respondent's mortgage to be a first lien upon the land.

It is admitted that the index contained the name of the mortgagor and mortgagee, and the contention of the appellant is that, under the rule announced by this court in *Ritchie v. Griffiths*, 1 Wash. 429 (25 Pac. 341), the mortgage of the appellant should have been decreed to have taken preference over respondent's mortgage and been declared a first lien. We do not think this contention can be sustained. It is true that in the case above referred to it was held that the deposit of a deed for record in the office of the county auditor does not operate as constructive notice to the public. In that case the deed had not been indexed at all, and the court was of the opinion that where one or two innocent persons must suffer a hardship,

the misfortune must rest on the person in whose business and under whose control it happened, and who had it in his power to avert it. Applying the same rule in this case, the misfortune, if any, should rest upon the appellant, for there was sufficient in the index to put it upon notice and to place it within its power to avert the misfortune by a more careful examination of the record.

It is true that this description is not technically correct. There is really nothing to indicate whether the figures "35" refer to section or lot, or whether the figure "7" refers to township or block; it might refer to either. But if one desired to purchase lot 35 in block 7, he would find the description of that lot and block in this index; or if he desired to purchase section 35 in township 7, he would also find the description in this index sufficient to cause a reasonable man to examine the record and ascertain whether the figures in the index referred to a lot or a section, a township or block.

In *Ritchie v. Griffiths*, *supra*, the court cited Jones on Mortgages, where that author says:

"Registry laws are intended to furnish the best and most easily accessible evidence of the title to real estate; to the end that those designing to purchase may be fully informed of instruments of prior date affecting the subject of their contemplated purchase, and also that having availed themselves of this means of knowledge they may rest there, and purchase in absolute security; provided they do so without knowledge, information, or such suggestion from other facts as would be gross negligence to ignore, of some antecedent conveyance or equitable claim."

Certainly we think that the index in this case furnished information, or at least a suggestion, of the fact of the record of the mortgage which the appellant

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could not ignore without the grossest kind of negligence. If it should be construed to be township and section, then the index of the sale of the whole of section 35, in township 7, must be construed to give notice of the same or any portion of such section or township, under the rule that the greater includes the less.

In *Barney v. Little*, 15 Iowa, 527, which was cited approvingly by the court in *Ritchie v. Griffiths*, *supra*, the court said:

“While the index, which serves, so to speak, as a finger-board to direct the inquirer, must not mislead him by giving a totally wrong description of lands, yet it is not necessarily and essentially a prerequisite to a valid registration that the index should contain a description of the lands conveyed. It is sufficient if it points to the record with reasonable certainty. If the grantors’ and grantees’ names are given in the index with the book and page where the instrument is recorded, and if the instrument is there really recorded, we believe that this, so far as the object of the recording act is concerned, is a substantial, though it may not be in all respects, as to the index book, a literal compliance with the law.”

The case at bar goes beyond this, so far as the requisites of the index are concerned, for here we have not only the names of the grantor and the grantee and the book in which the instrument is recorded, but we also have a description, though imperfect, of the land itself, sufficient to challenge the attention of the searcher of the record, and one who purchases after such challenge is not an innocent incumbrancer or purchaser without notice. For even though the constructive notice was not technically given, certainly the record furnished a sufficient notice in fact to place the subsequent purchaser upon his inquiry.

We are satisfied with the rule announced in *Ritchie v. Griffiths*, but we do not think it should be extended. The judgment will therefore be affirmed.

HOYT, C. J., and SCOTT and GORDON, JJ., concur.

[No. 2114. Decided September 30, 1896.]

WESLEY COMPTON, *Receiver, Respondent*, v. SCHWABACHER BROS. & Co., *Appellant*.

RECEIVERS — LEAVE OF COURT TO SUE — ESTOPPEL — INSOLVENT CORPORATION — FRAUDULENT PREFERENCE — ATTACHMENT BY CREDITOR — COSTS.

Leave of the court appointing a receiver to sue is not necessary before instituting suits in matters connected with his trust.

A judgment by confession, made by an insolvent corporation in favor of one of its creditors, who has knowledge of its insolvent condition, and which confession is given and accepted for the purpose of making a preference in favor of such creditor over others, is void as against the other creditors.

A receiver for an insolvent corporation is not estopped from assailing a confession of judgment by the corporation as fraudulent by reason of the fact that in a former receivership the receiver had treated the judgment as valid, and had been discharged by the court upon a false representation that all the debts of the corporation, except a balance on such judgment, had been paid.

The fact that an order of court is made refusing to dissolve an attachment under sec. 318, Code Proc., does not establish the validity of such attachment as against creditors, but it may be attacked by the receiver.

An attachment levied upon the property of an insolvent corporation by a creditor having knowledge of its condition may be set aside, although insolvency proceedings had not been instituted, under the rule in this state constituting the assets of an insolvent corporation a trust fund for the benefit of all its creditors.

An attachment creditor who withholds possession from a receiver of the property of an insolvent corporation, which had been obtained by attachment levy, is not entitled to recover costs paid to the

15	806
128	178
15	806
86	98
15	309
142	42

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sheriff for the care and custody of the property levied on, including rent of the premises where the property had been kept, in an action instituted by the receiver to dissolve the attachment.

Appeal from Superior Court, King County.—Hon. J. W. LANGLEY, Judge. Affirmed.

Donworth & Howe, for appellant.

Winsor, Bush & Morris, Boyd J. Tallman and Allen & Powell, for respondent.

The opinion of the court was delivered by

GORDON, J.—Respondent is the receiver of the Abrahams Grocery Company. He was appointed and qualified as receiver on the 27th of November, 1894, and subsequently instituted this action for the purpose of restraining the sale of a stock of merchandise belonging to such corporation, which had been levied upon by the sheriff under an execution issued upon a judgment confessed by the corporation in favor of appellant, Schwabacher Bros. & Co. (a corporation), on the 15th of November, 1893. Also, to set aside such judgment and require the sheriff to turn the property levied upon over to the respondent. The ground upon which the relief is sought is that the judgment entered upon confession was made by the Abrahams Grocery Company at a time when the corporation was insolvent, and known by the appellant to be insolvent, and was entered with the intention of creating an unlawful preference over the other creditors of such insolvent corporation, and was accepted for the purpose of hindering, delaying and defrauding the other creditors; and that the property levied upon is all of the property of said corporation. There are other allegations of the complaint attacking the validity of the judgment upon various grounds not neces-

sary to be here considered. The answer denied the allegations of the complaint as to the insolvency of the Abrahams Grocery Company; denied that the confession of judgment was executed for the purpose of giving the appellant a preference; denied the various allegations of irregularity and insufficiency, and set up two affirmative defenses, the second of which is that in addition to the lien created by the levy of an execution based on said judgment of confession upon the property in question, it also had an attachment lien by virtue of a writ of attachment issued on the 27th day of November, 1894, in an action on that day commenced against the Abrahams Grocery Company. The lower court, proceeding without a jury to determine the issues, made its findings and conclusions upon which a decree was entered in favor of the respondent, and the cause was appealed.

1. The first contention is that the court erred in not granting appellant's motion for a non-suit, upon the ground that a receiver cannot bring a suit without first obtaining leave from the court which appointed him. Since the filing of the briefs in this case that question has been determined by this court adversely to the appellant's contention. *Hardin v. Sweeney*, 14 Wash. 129 (44 Pac. 138).

2. It is next contended that the court erred in holding the confession of judgment void. The lower court found as a fact that, at the date of said confession, the corporation making it was indebted to various parties in amounts greatly exceeding the amount of its assets; that it was unable to pay its creditors and continue in business, and was insolvent; and that on that day its president, for the purpose of securing the appellant and paying it out of the assets of the corporation in preference to other creditors, caused said confession

of judgment to be made. It is contended that the evidence is insufficient to justify this finding, but we are satisfied that it is sufficiently supported. Upon the trial it was shown that a receiver had been appointed for the said Abrahams Grocery Company on the 15th of November, 1893, upon the petition of Richard Winsor, secretary of said corporation; that said receiver qualified and entered upon the discharge of his duties; that the creditors of the corporation attacked the validity of appellant's judgment and an issue was thereon framed in said insolvency proceedings; that while said issue was pending, the corporation, at the instance of the appellant, compromised with the contesting creditors; and thereafter the receiver filed a report, representing, among other things, that all of the debts of the corporation had been fully paid, excepting a balance upon appellant's judgment. In this petition he asked permission to turn over to the Abrahams Grocery Company, subject to the lien of appellant's judgment, the goods and chattels remaining in his hands, and that he might be discharged from further custody and control of the same, and released and discharged as receiver. Accompanying this petition was the stipulation of appellant, agreeing to the discharge of the receiver and consenting that the property should be turned over to the corporation subject to appellant's judgment. Thereupon an order was made approving the report of the receiver as to the receipts and disbursements reported by him, and relieving him from further duty.

It was shown by the evidence that a large portion of the indebtedness of the insolvent corporation *had not* in fact been paid by the receiver, but that the officers of said corporation had obtained from certain of its creditors extensions of time for payment, and in

some instances had given renewal notes. It was further made to appear that the appellant had advanced to the Abrahams Grocery Company the sum of \$1,000 for the purpose of enabling it to make settlement with its creditors, and that claims against said corporation were compromised for sums less than the amount of its actual indebtedness; that after the receiver had, pursuant to the order of the court, turned back to it the goods and personal effects, it executed a mortgage in favor of the appellant securing said sum of \$1,000 advanced for the purposes hereinbefore mentioned; and thereafter the corporation, the Abrahams Grocery Company, resumed business and continued therein until the 27th of November, 1894, upon which day the attachment already referred to was levied, and on the same day the respondent was appointed receiver.

We think that the lower court correctly found that the Abrahams Grocery Company was insolvent at the time when the judgment upon confession was entered, and also at the time when the attachment was levied. We also think that the evidence is sufficient to show that the insolvent condition of said corporation at both of said dates was known to the appellant. We do not think that the respondent, who is the representative of all the creditors of such insolvent corporation, should be estopped from assailing the confession of judgment as fraudulent by reason of the matters occurring in the former receivership proceedings, already noticed. The order discharging the former receiver cannot be held to bar the present action. It simply approved of the accounts of the receiver and of the turning over of the property on hand to the corporation, and beyond that determined nothing. It is clear from the evidence that the receiver in his report attempted to impose upon the court and that his representations

that the debts of the corporation were in fact paid were false. It is also clear that the falsity of the report in this respect was known to the appellant, and we are unable to avoid the conclusion that said receiver was acting under the direction and at the instigation of the appellant. But, however that may be, the evidence was sufficient, we think, to justify the court's conclusion that the judgment by confession was for the purpose of giving the appellant a preference over all other creditors of the then insolvent corporation, and that appellant accepted it for the like purpose. *Conover v. Hull*, 10 Wash. 673 (39 Pac. 166).

3. It appears from the record that after his qualification the respondent moved the court to set aside and dissolve the attachment of November 27, 1894. This motion was made under § 318, Code Proc., and was based upon affidavits. The lower court denied said motion and this court affirmed the order upon appeal. 14 Wash. 225 (44 Pac. 257).

It is urged by appellant that this established the validity of its attachment, and that the lower court was without jurisdiction in this cause to interfere therewith. We are unable to agree with this claim. Sec. 318, *supra*, provides that,

"The defendant may at any time after he has appeared in the action . . . apply on motion . . . to the court in which the action is brought . . . that the writ of attachment be discharged on the ground that the same was improperly or irregularly issued."

It clearly appears that the question of the insolvency of the defendant in attachment was not made a ground for dissolution in the motion already referred to. Upon that point this court said in disposing of the appeal:

“We are unable to discover from the record that the appellant corporation is insolvent. . . . It therefore becomes unimportant to determine whether an attachment may be had in this state against the property of an insolvent corporation.”

Under the statute already referred to the only parties before the court are the parties to the attachment proceedings. It is the “defendant” who may make the motion, and the court has no jurisdiction therein to determine the rights of other creditors. Plaintiff, *as against the defendant*, might be entitled to an attachment, but an order sustaining it cannot be held to bar other creditors from asserting its invalidity in a proper proceeding. The creditors of this insolvent corporation, whose representative the respondent is, are entitled to their day in court on the question of the validity of this attachment, and the statute referred to does not contemplate that they may be heard in the proceedings upon motion to discharge. We therefore conclude that the order denying the motion to dissolve the attachment cannot be invoked by appellant for the purpose of defeating the jurisdiction of the court in the present proceeding.

4. Our conclusion upon this phase of the case makes it necessary to determine whether an attachment levied upon the property of a corporation which is in fact insolvent at the time of the levy, can be set aside where insolvency proceedings had not been instituted prior to the attachment. Whatever rule may prevail elsewhere, it is now well settled in this state that the assets of an insolvent corporation constitute a trust fund for the benefit of all of its creditors. *Thompson v. Huron Lumber Co.*, 4 Wash. 600 (30 Pac. 741); *Conover v. Hull*, *supra*; *McKay v. Elwood*, 12 Wash. 579 (41 Pac. 919).

And we think it must be held that no preference can be maintained, based upon any action or proceeding of a creditor taken with knowledge of the insolvent condition of such corporation. It is wholly inconsistent with the trust fund theory to permit a race of vigilance to be instituted between the creditors of an insolvent corporation. As between them "equality is equity." *Ford v. Plankinton Bank*, 87 Wis. 363 (58 N. W. 766); *Tompson v. Huron Lumber Co.*, 5 Wash. 527 (32 Pac. 536); *Conover v. Hull*, 10 Wash. 673 (39 Pac. 166).

5. Nor do we think that appellant is entitled to recover costs paid to the sheriff for the care and custody of the property levied upon under the attachment, including the rent of the premises where the property was kept. The record discloses that immediately upon qualifying the respondent demanded possession of the property which was refused, and thereafter was obliged to institute proceedings for its recovery. In withholding the property from the receiver, appellant took its chances. It had an opportunity, without incurring such expense, to come in and share ratably with the other creditors of the insolvent corporation. Instead of voluntarily doing so it saw fit to resist, and sought to enforce its claim to a preference. It did so at its peril and must abide the consequences.

The conclusion which we have reached upon the questions already considered makes it unnecessary to determine some minor questions discussed in the briefs of counsel. The decree will be affirmed.

DUNBAR, SCOTT and ANDERS, JJ., concur.

[No. 2279. Decided September 30, 1896.]

STATE OF WASHINGTON *on the Relation of Thomas R. Brown et al , Receivers*, v. THE SUPERIOR COURT OF WHATCOM COUNTY, AND JOHN R. WINN, *Judge*.

MANDAMUS — APPLICATION FOR WRIT — LACHES.

A writ of mandate to compel a superior court to entertain an appeal from a justice of the peace will not issue, where application for relief by mandamus was not made until after a lapse of four months from the date the ruling complained of was made.

Original Application for Mandamus.

Carr & Preston, and *W. R. Bell*, for relators.

Per Curiam.—This is an application for a writ of mandate to compel the respondent court to entertain an appeal from a justice of the peace. Although several objections are urged against granting the writ, we find it necessary to pass upon one of them only, and that is the delay of relators in making the application.

The ruling of the respondent complained of was made on the 11th day of February last, while the first move made in this court was on June 25th. It was incumbent on the relators to proceed diligently in order to obtain relief by mandamus, and the delay of four months alone would require a denial of their petition.

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Syllabus.

[No 2294. Decided September 30, 1896.]

C. C. HANSEN *et al.*, *Dike Commissioners, Respondents*,
 v. HIRAM HAMMER, *County Auditor, Appellant*.

15	315
120	91
120	94

CONSTITUTIONAL LAW—ESTABLISHMENT OF DIKING DISTRICTS—AUTHORITY TO LEVY SPECIAL ASSESSMENTS—APPROPRIATION OF PROPERTY—COMPENSATION TO OWNER—WHAT IS A PUBLIC PURPOSE.

An act of the legislature providing for the establishment of diking districts, the construction and maintenance of dikes and the assessment of property benefited to pay therefor, is not unconstitutional under art. 7, §9, of the constitution, which seems to restrict the delegation of legislative power to authorize local improvements by special assessment, or by special taxation of property benefited, to the corporate authorities of cities, towns and villages, when the same section further provides that "for all corporate purposes, all municipal corporations may be vested with authority to assess and collect taxes, and such taxes shall be uniform in respect to persons and property within the jurisdiction of the body levying the same."

A law providing for the condemnation of rights of way for the construction of dikes is not unconstitutional as authorizing a taking of private property without full compensation therefor having been made in money, when provision is made therein for ascertaining the cost and collecting same by assessment or the issuance of bonds, as the presumption would be that compensation would be provided in this manner before actual construction began.

The appropriation of land for the construction of local dikes within the territory of diking districts authorized by law to be formed is a taking for a public purpose.

Upon the formation of a diking district under Laws 1895, p. 304, personal service upon every person within the district of notice of the petition to organize the district is unnecessary, and failure to give such personal service would not constitute a taking of private property without due process of law.

Appeal from Superior Court, Skagit County. — Hon. HENRY MCBRIDE, Judge. Affirmed.

George A. Joiner, for appellant.

Million & Houser, for respondents.

The opinion of the court was delivered by

SCOTT, J.—This case involves the constitutionality of the act providing for the establishment of diking districts. (Laws 1895, p. 304.) The lower court sustained the act, and this appeal was taken.

It is first contended that the act is in violation of § 9, art. 7, of the constitution, which reads as follows :

“The legislature may vest the corporate authorities of cities, towns, and villages with power to make local improvements by special assessment, or by special taxation of property benefited. For all corporate purposes, all municipal corporations may be vested with authority to assess and collect taxes, and such taxes shall be uniform in respect to persons and property within the jurisdiction of the body levying the same.”

It is urged with much force that as the constitution authorizes the legislature to vest the corporate authorities of cities, towns and villages with power to make local improvements by special assessment or taxation of property benefited, it in effect prohibits the granting of such power to any other corporation. As the effect of sustaining this contention would be to prohibit all similar legislation and to prevent the construction of such improvements by assessments upon the property benefited except in cities, towns and villages, without an amendment to the constitution, it will be seen that the question presented is a most important one.

Counsel have called our attention to two decisions construing somewhat similar constitutional provisions in other states. One of these is *Updike v. Wright*, 81 Ill. 49, where it was held that such a provision in relation to cities, towns and villages prohibited the granting such power to any other corporation. The other case is that of *State v. Dodge County*, 8 Neb. 124

(30 Am. Rep. 819), where the supreme court of Nebraska took the contrary view and held that such a provision only prescribed the rule of apportionment of such special taxes, and did not prohibit the legislature from conferring power to make local improvements by special assessment or taxation upon property benefited upon other municipal corporations. In both of these constitutions, the second clause of the provision reads "for all *other* corporate purposes" instead of "for all corporate purposes" as ours reads, and the clause could not be construed here as providing a rule of apportionment in constructing such improvements merely, for we have held that cities, etc., could construct them and pay therefor by a general tax, and it would seem that the first clause of the provision would be deprived of any force, if it has not a prohibitive one as to the exercise of the power by other corporations.

Several cases, upon which this provision would have a direct bearing, have heretofore been decided by this court, but in none of them was it called to our attention. These cases are *Board of Directors v. Peterson*, 4 Wash. 147 (29 Pac. 995), where the court held that an irrigation district, formed under the act there in question, was not a municipal corporation within the meaning of § 6, art. 8, of the constitution; *Seanor v. County Commissioners*, 13 Wash. 48 (42 Pac. 552), where, in considering the act relating to an improved system of roads, etc., the court also held that an assessment, levied upon the property benefited, was not a tax within the meaning of § 12, art. 11, of the constitution; and *Cass v. Dicks*, 14 Wash. 75 (44 Pac. 113), which was an injunction suit to restrain the building of a dike under the present law. Legislation involving the same principle was sus-

tained in the two former cases, and the constitutionality of this act was not questioned in the decisions of the last case. It will thus be seen that this case comes to us complicated by those decisions, for, if said provision is held to prohibit legislation of the kind involved here, a different decision should have been rendered in each of those cases. While the effect of holding that it is not a prohibition may be to give little or no effect to the first clause in the provision, and while the general rule is, that a constitution should be interpreted, if possible, to give effect to all parts of it, yet considering the fact that this provision in our constitution is more like the one in the Nebraska constitution than any other to which our attention has been called, and that, at the time our constitution was adopted, the supreme court of Nebraska had construed the same in the case cited, and furthermore in view of the possible effect upon prior legislation and constructed improvements above mentioned, we are somewhat compelled to the conclusion that it should not at this time be held to be a prohibition, and especially as we doubt whether the strictness of the rule of construction, as applied to constitutions rather than acts of the legislature so as to give full effect to every expressed part of it, should obtain in as great a degree at this time as formerly, owing to the modern tendency to legislate in constitutions, as the real spirit and intent of it might thereby be defeated.

The respondents practically concede that the provision in question would amount to a prohibition on the legislature to confer like powers upon other municipal corporations than cities, towns and villages, and that it would apply to counties, they being municipal corporations under our constitution. But it is con-

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tended that under the holding of this court in *Board of Directors v. Peterson, supra*, that a corporation of this kind would not be a municipal corporation. But we regard that question, for the purposes of this case, as unimportant, for we would not be disposed to construe the provision as preventing the legislature from conferring upon the corporate authorities of the county similar powers, and at the same time hold that the legislature might carve a district out of a portion of a county and create another set of officers with authority to construct such improvements, for, if so, the legislature could make an entire county a district and thus, by merely providing for other officers to carry on the work, evade the force of the provision. We are of the opinion that the legislature could have conferred the power upon counties directly. The second clause in the provision which provides that "for all corporate purposes, all municipal corporations may be vested with authority to assess and collect taxes," etc., must mean general corporate purposes affecting all the people in the county, and for that reason such taxes should be uniform, but would not prohibit the levying of an assessment upon property benefited for the purpose of constructing an improvement which might benefit a portion of the county only.

It is next urged that the act is in derogation of § 16, art. 1, of the constitution, in that it permits the taking of private property for the right of way without full compensation therefore being first made in money or ascertained and paid into court for the owner. But no such taking is complained of in this case, and from the examination we have given the act, we do not think that it would necessarily result, and, as the case is presented, we are not disposed to hold the act unconstitutional at this time on that ground. While the

cost is to be paid for by an assessment upon the property benefited, authority can be given by the legislature, if it is not now contained in the act, to collect the assessments in advance of the commencement of actual construction. Furthermore, the act provides for the issuance of bonds under certain contingencies to obtain money for the construction of the improvement. While the owners of land to be taken for a right of way, have a right to compensation before they are dispossessed, whether by a municipal or any other corporation (*Lewis v. Seattle*, 5 Wash. 741 (32 Pac. 794), and the money therefor must be provided in some manner for all such owners not waiving advanced payment, still all the preliminaries, including condemnation proceedings, to ascertain the cost and everything in advance of the commencement of actual construction, can be carried on and completed before it is necessary to take the land, and the decree of condemnation can provide for payment before the owner is dispossessed, and for a forfeiture of the right, if not made within a reasonable time. No basis of assessment can be laid until the cost of the improvement is ascertained, and it is necessary to know the cost of the right of way. This law provides that in case the cost of the improvements exceed the benefits, the whole scheme is to be abandoned.

The next objection is answered by saying that the taking is for a public purpose.

It is further contended that the act is unconstitutional because it permits the taking of private property without due process of law, but as to the objections urged in this respect, we do not think it is necessary that there should be personal service, on every person within the district, of notice of the petition to organize the district. And when it comes to obtain-

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ing the right of way, ample provision, for service upon owners of land to be taken, seems to have been made, at least there is no question presented in this case which would authorize us to hold that a good and valid service could not be made under the act.

Affirmed.

DUNBAR, ANDERS and GORDON, JJ., concur.

HOYT, C. J., dissents.

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d17 141

[No. 2306. Decided September 30, 1896.]

B. A. MUNSON, *Appellant*, v. GEORGE MUDGETT, *County Treasurer, Respondent*.

COUNTIES — INTEREST COUPONS ON BONDS — WARRANTS — PRIORITY OF PAYMENT.

Under Gen. Stat., § 2681, providing that interest coupons on the bonded indebtedness of counties should rank as warrants upon the general fund, the holder of county warrants issued subsequent thereto and subsequent to the act of 1893 (Laws 1893, p. 250, § 2), providing that "all warrants drawn on the funds of the county shall be redeemed by the treasurer in the order of their issuance," is not entitled to have his warrants paid as long as there are insufficient funds to meet any interest coupons that may be due.

Where interest coupons upon county bonds are by their terms payable at a designated time and require no presentation for the purpose of fixing the time and order of payment, their payment cannot be postponed and the rights of the holders subordinated to those of the holders of county warrants subsequently issued.

Appeal from Superior Court, Spokane County.—
Hon. JESSE ARTHUR, Judge. Affirmed.

James Hopkins, for appellant.

B. N. Carrier, for respondent.

The opinion of the court was delivered by

GORDON, J.—This was an application in the lower court for a writ of mandate. The affidavit for the writ states that the appellant was, on the 17th of July, 1896, the owner of certain warrants drawn on the general county fund of Spokane county, aggregating \$322.30; that on that day he presented said warrants to the respondent (county treasurer) and demanded payment thereof; that although the respondent had on hand, belonging to said general fund, sufficient funds wherewith to pay the same, payment was refused.

In answer to the alternative writ the respondent set up that on January 1, 1892, Spokane county, pursuant to authority conferred under the act of March 21, 1890, issued and sold its bonds amounting to \$183,000; that said bonds draw interest at six per cent. per annum, payable on the 1st day of January of each year, in accordance with interest coupons attached thereto; that said bonds and coupons were prior in date and issue to the relator's warrants; and the inability of respondent to pay both the interest and the warrants because of insufficient funds. The court below denied the writ and dismissed the suit at relator's cost, from which he has appealed.

The only question for determination is whether the interest coupons are entitled to priority of payment over appellant's warrants. As already stated, the bonds and coupons were issued prior to the date of the issuance of relator's warrant's. Sec. 8, of the act of March 21, 1890 (§ 2681, Vol. 1, Hill's Code), is as follows:

"The coupons hereinbefore mentioned for the payment of interest on said bonds shall be considered for all purposes as warrants drawn upon the general fund

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of the county issuing bonds under the provisions of this chapter, and when presented to the treasurer of the county issuing such bonds, and no funds are in the treasury to pay the said coupons, it shall be the duty of the treasurer to indorse said coupons as presented for payment, in the same manner as county warrants are indorsed, and thereafter said coupons shall bear interest at the same rate as county warrants so presented and unpaid.” .

Sec. 2 of the act of March 10, 1893 (Laws 1893, p. 250), provides :

“ All warrants drawn on the funds of the county shall be redeemed by the treasurer in the order of their issuance.”

We are unable to determine from the record whether relator's warrants were issued before or subsequent to the passage of the act last referred to; but in aid of the presumption of regularity which attends all judgments of a court of record, we would be bound to presume that the warrants were issued subsequent to the passage of said act, and upon that assumption we think that the judgment was right.

Independent of this consideration, we think the judgment must be sustained upon the further ground that the interest coupons were by their terms payable at a designated time, and required no presentation for the purpose of fixing the time and order of payment, and that appellant received his warrants with full knowledge of the outstanding bonds and their conditions. It is not unreasonable to presume that the certainty of payment of the interest at the times fixed by the contract was an element tending to enhance the market value of the bonds, and that the county was enabled thereby to obtain the money upon more favorable terms than it could have otherwise done.

Our conclusion is that payment of the interest coupons cannot be postponed and the rights of the holders subordinated to those of the holders of warrants subsequently issued.

The judgment is affirmed.

HOYT, C. J., and DUNBAR, J., concur.

[No. 2178. Decided October 1, 1896.]

TOWN OF TUMWATER, *Appellant*, v. WILLIAM PIX, *Respondent*.

MUNICIPAL CORPORATIONS—NOTICE OF STREET ASSESSMENT—SUFFICIENCY—PLEADING.

Personal notice to a property owner affected by a proposed levy of assessments for a street improvement is sufficient, even where the statute provides for publication of notice in an official newspaper.

Where a municipality of the fourth class proposes to levy an assessment for a street improvement under Laws 1893, p. 226, which requires notice thereof to be published in the official newspaper of the corporation for ten days, but the town is not authorized by law to designate an official newspaper, the requirements of the statute as to notice will be satisfied by personal service of notice upon the parties affected by the proposed assessment.

An allegation in a complaint that "notice of an assessment and of the hearing and considering of objections to the assessment roll was given defendant personally," is sufficient, as against a demurrer, to show that actual notice was given to defendant.

Appeal from Superior Court, Thurston County.—
Hon. T. M. REED, JR., Judge. Reversed.

Milo A. Root, for appellant.

Charles H Ayer, for respondent.

The opinion of the court was delivered by

DUNBAR, J.—The town of Tumwater, a municipal

Oct. 1896.] Opinion of the Court—DUNBAR, J.

corporation of the fourth class, brought this action under the provisions of Chapter XCV of the laws of 1893 (p. 226), to foreclose a lien upon certain real estate of defendant for grading and improving the street in front of such property. The defendant interposed a demurrer to the amended complaint, which demurrer was sustained by the court.

The demurrer attacked the complaint for the reason that the same did not state facts sufficient to constitute a cause of action. The appellant addresses itself in its brief to only one objection, viz., the lack of proper notice. The respondent, however, raises three questions, viz., that the complaint fails to state that an assessment has been made and in lieu of this primary requisite says that the city *attempted* to levy an assessment; that the notice given was not sufficient; and that, if it was, the service of the notice was not properly pleaded.

We think there is nothing in the first contention worthy of discussion. The law under which the action was brought was to correct attempted assessments. If it had been an assessment under the law there would have been no occasion for the enactment.

The second objection, that the complaint shows a want of notice, we think is more technical than meritorious. Sec. 4 of the act provides that upon receiving the said assessment roll the clerk of such city or town shall give notice by three successive publications in the official newspaper of such city or town that such assessment roll is on file in his office; the date of filing of same, and said notice shall state a time at which the council will hear and consider objections to said assessment roll by the parties aggrieved by such assessment; and provides for ten days'

notice, etc. The complaint in this case, in regard to notice, is as follows:

“That December 17, 1894, at one o'clock P. M. was fixed by the Tumwater council as the time for considering and hearing by it any and all objections to assessments and assessment rolls referred to in the foregoing paragraph; that notice of said hearing and of said assessment was given on December 5, 1894, by one publication in the Morning Olympian, a daily and weekly newspaper of general circulation in said town of Tumwater in Thurston county, and which said newspaper was then and had been long prior thereto the newspaper designated by its council as the paper in which all publications for such town should be made and in which they were made, and which was the official newspaper of said town so far as it was possible for such town to have an official newspaper; that notice of said assessment and of the hearing and considering of objections to said assessment roll was also given to this defendant personally at his home in the town of Tumwater, Washington, on or about the 6th day of December, 1894, and over ten days prior to the 17th day of December, 1894, the date fixed for the hearing and consideration by the council of all objections as aforesaid.”

The complaint shows that the law in relation to the publication in the official newspaper could not be literally complied with, for it shows that the plaintiff was a municipality of the fourth class and could have no official newspaper as provided by law. It therefore became impossible to comply with the strict requirements of § 4 so far as the publication of the notice was concerned. This compliance therefore being impossible, a notice which was equivalent to statutory notice should be held sufficient. *Darlington v. Commonwealth*, 41 Pa. St. 68.

The publication by the official newspaper is only at best constructive notice. It may reach the knowledge

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of the defendant or it may not; but under the policy of the law he is bound to take notice of it whether he actually sees it or not, if the statutory requirement is strictly followed. But from the standpoint of reason no notice can be better than actual notice. The only object in requiring publication is to give notice so that the property owner may have an opportunity to appear and protest. This requirement is fully met by actual notice, and notice by publication or constructive notice could not aid him in any way if as a matter of fact he had actual notice; for, as is well said by the appellant in its brief,

“A literal compliance will not be insisted on where it would kill the very spirit of the statute. The object of the statute in requiring publication of notice was to give property owners a chance to appear and protest. Actual notice accomplishes this object fully. A thousand publications could add nothing to it.”

But it is urged by the respondent that even though this be true, the actual notice was not sufficiently pleaded; the complaint should have stated the manner in which the notice was given. We think the allegation of the complaint is as broad as the statute. It points out no particular way and no particular form of notice for publication, and the complaint does not allege any particular manner of giving notice personally. It does, however, allege that notice of said assessment and hearing and consideration of objections to said assessment roll was given to defendant personally, and ten days prior to the date of hearing the protest. This, it seems to us, is good as against the demurrer. The demurrer must assume, under the allegations of this complaint, that notice was given personally. If the manner of giving the notice was not sufficiently definite, it would have been the office of a motion to make

more definite and certain and have corrected the complaint. But we think this complaint was sufficient to put the defendant upon his denial so far as the giving of personal notice was concerned.

The judgment will therefore be reversed and the cause remanded with instructions to overrule the demurrer, the appellant to obtain its costs in this court.

Hoyt, C. J., and Scott, Anders and Gordon, JJ., concur.

[No 2273. Decided October 1, 1896.]

GABRIEL ASPLUND, *Respondent*, v. CHARLES MATTSON,
Appellant.

PLEADING — DEPARTURE — WAIVER OF OBJECTION — CONTRACT — BREACH
— BURDEN OF PROOF.

By proceeding to trial without raising the objection that the reply constitutes a departure from the cause of action set out in the complaint, the defendant waives his right to urge the objection on appeal.

Where work under a contract has been suspended because of plaintiff's inability to proceed therewith owing to acts of God preventing the work, there is no breach of contract, and where defendant enters and dispossesses plaintiff prior to the period fixed by the contract for completing the work, the burden of proof is on defendant, in an action to recover damages for breach of contract, to prove that plaintiff was not ready and willing to continue in the performance of said work and refused to go upon said land as soon as it was in condition to have work done upon it.

Appeal from Superior Court, Skagit County.—Hon. HENRY MCBRIDE, Judge. Affirmed.

Frank Quinby, for appellant.

Million & Houser, for respondent.

Oct. 1896.] Opinion of the Court—GORDON, J.

The opinion of the court was delivered by

GORDON, J.—Respondent brought this action to recover damages for breach of a contract in writing entered into between the parties, by the terms of which the respondent undertook and agreed to clear, ready for plowing, sixty acres of land on the homestead of the appellant, and to commence work by July 1, 1892, "and continue until finished, which shall not be later than October 1, 1893, and if discontinued for more than thirty days said Mattson shall have sufficient cause for nullifying this contract." The answer of the defendant was a general denial, coupled with an affirmative defense and counterclaim. There was a verdict and judgment thereon for respondent, and the defendant in the action appealed.

1. It is urged in this court that the reply of the respondent constitutes no defense to the affirmative defense contained in the answer, and it is further contended that the reply was a departure from the cause of action set out in the complaint. We have become satisfied from an examination of the pleadings that these objections are not well taken, but in any event we think that they come too late, and that by proceeding to trial without objection the appellant has waived his right to urge them.

2. It is next complained that the court erred in instructing the jury. It is conceded that the respondent had commenced the work, and cleared a considerable portion of the land and that the appellant had from time to time advanced as part payment of the contract price the sum of \$615. It also appears that the respondent had discontinued work during the spring and summer months of 1893, pleading as an excuse for so doing that he was prevented from prosecuting the work by reason of the excess of rain fall, flooding

the land to an extent not contemplated by the parties at the time of the execution of the contract, and such as to hinder and make it impossible for him to continue the work, and that his failure to go ahead was by reason of an act of God, whereby he was excused. It further appeared that on the 10th of August, 1893, and before the time fixed by the contract for the completion of the work, the appellant entered upon the premises, took possession thereof and completed the work. The instruction complained of in this regard is as follows:

“If, gentlemen of the jury, you believe from the evidence that the plaintiff was prevented from continuing the work in clearing said land for the reason that there had been excessive rainfall in the spring and summer of 1893, thereby flooding the land of defendant to such an extent, and the same not being contemplated by the parties at the time of the execution of the contract, and so as to hinder and make it absolutely impossible for plaintiff to continue the work at that time, and without allowing thirty days to elapse without performing said work, or any part thereof, that is, that he was prevented from going ahead with the work by an act of God, that is a legal excuse for the plaintiff's discontinuing the work. And it having been conceded that the defendant was upon the lands on or about the 10th day of August, 1893, and began to complete the work which plaintiff was to perform under the terms of the contract, then and because of that act the burden of proof is shifted upon the defendant to prove that plaintiff was not ready and willing to continue in the performance of said work and refused to go upon the land as soon as it was in condition to have work done upon it; and should you find that the defendant has not, by a fair preponderance of the evidence, proved such refusal, and should you further find that plaintiff was prevented from so completing such work by reason of the acts of the defendant in going upon said premises and

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Opinion of the Court—GORDON, J.

performing the work himself, then you should find for the plaintiff and fix his damages at the amount of what you may believe from the evidence would have been the fair profits of the entire contract had he been allowed to finish the same."

It is contended that the burden of proof did not shift upon the defendant to prove that the plaintiff was not ready and willing to continue the work. But we think counsel is mistaken in assuming that the discontinuance of the work upon the part of respondent constituted a breach. And in the light of the evidence and the verdict rendered, the jury evidently considered respondent's failure to prosecute the work during the spring and summer months, excusable. Under the circumstances there was no breach of contract upon his part. The work was simply suspended, and the appellant having entered and dispossessed respondent prior to the period fixed by the contract for completing the work, he assumed the burden of proof as charged in the instruction complained of. Bishop, Contracts, §§ 608, 609; 3 Am. & Eng. Enc. Law, p. 899; 2 Parsons, Contracts (6th ed.), *672.

3. The next error complained of relates to the giving of another instruction. But when the instruction is considered in the light of the admitted fact that the appellant took possession of the premises and the further fact that the jury have by their verdict determined that there was no breach of the contract upon the respondent's part, we think that the giving of the instruction was not error; and in any event it was not prejudicial error.

4. The remaining objection is that the verdict and judgment is not supported by the evidence; and it is urged upon the theory that the jury based the amount of the recovery given upon the assumption, that the

plaintiff was entitled to recover the total amount of what he would have made had he been allowed to complete the contract. We have examined the evidence and the charge of the court bearing upon this feature of the case, and do not feel warranted in disturbing the verdict.

Affirmed.

DUNBAR and ANDERS, JJ., concur.

15	333
16	650
15	332
635	24

[No. 2138. Decided October 2, 1896.]

ALFRED MOSHER *et al.*, Respondents, v. CHARLES BRUHN *et al.*, Defendants, SEATTLE HARDWARE COMPANY, Appellant.

SUFFICIENCY OF COMPLAINT — WAIVER OF OBJECTIONS — INTERPLEADER.

Where the objection that the complaint does not state a cause of action has been raised in the lower court by demurrer, and the demurrer has been subsequently waived, the defendant cannot raise the objection of insufficiency of the complaint on appeal, as Code Proc., § 193, permitting the defendant to raise the objection at any stage of the proceedings that the complaint does not state a cause of action has no application to cases where the point has been once raised in the lower court by demurrer and then abandoned.

When a complaint is attacked after judgment for want of facts to state a cause of action, it must be most liberally construed and the judgment sustained, if by any reasonable intendment it can be.

A complaint in an action of interpleader is sufficient, especially when first objected to after judgment, when it alleges that plaintiff was indebted to a certain firm, that it had been garnished by two creditors of said firm, one of whom had obtained a judgment against plaintiff, but that the other garnishing claimant is assailing such judgment as void, that plaintiff is willing to pay the money due the principal debtor to the party entitled thereto and offers to pay said money into court to be applied as the court shall determine.

Appeal from Superior Court, King County.—Hon. J. W. LANGLEY, Judge. Affirmed.

Oct. 1896.]

Opinion of the Court — GORDON, J.

Bronson & Clark, for appellant.*Bausman, Kelleher & Emory*, for respondents.

The opinion of the court was delivered by

GORDON, J.—The respondents were, on the 18th day of November, 1893, indebted to the firm of Charles H. Baker & Co. in the sum of \$913.79. On that day the appellant, the Seattle Hardware Company, commenced an action for the recovery of money, against said firm, and at the same time sued out a writ of garnishment and caused the same to be served upon the respondents. Thereafter such proceedings were had that judgment was rendered in said garnishment proceeding against respondents for the sum of \$913.79. Subsequently the firm of Bruhn & Henry caused an execution to be issued on a judgment recovered by said firm against said firm of Baker & Co., and caused a garnishment thereunder to be served upon the respondents, and an order requiring respondents to appear for the purpose of being examined upon supplementary proceedings. Thereupon respondents brought this action of interpleader under § 153, Code Proc., (Vol. 2, Hill's Code), which is as follows:

“Any one having in his possession, or under his control, any property or money, or being indebted, where more than one person claims to be the owner of, entitled to, interested in, or to have a lien on such property, money or indebtedness, or any part thereof, may commence an action in the superior court against all or any of such persons, and have their rights, claims, interest, or lien adjudged, determined and adjusted in such action.”

The complaint, in addition to the facts already set forth, alleges that the firm of Bruhn & Henry assert “that the proceedings in garnishment instituted by

said Seattle Hardware Company are without jurisdiction and void." The complaint also alleges that the appellant threatened and was about to issue execution upon the judgment recovered against the respondents in such garnishment proceedings. Also that the firm of Bruhn & Henry were pressing their garnishment against respondents; and continuing, says :

"There is danger that judgment will also be rendered in favor of said Bruhn & Henry and against plaintiffs, and that plaintiffs will be compelled to pay said indebtedness twice; that the amount claimed by each of said firm is equal to the total amount of indebtedness due from the plaintiffs to said Baker & Co.; that these plaintiffs are able and willing to pay said sum of \$913.79 to the party entitled thereto, and only desire that the court shall determine to whom said money is entitled and offer at any time upon the order of said court to pay said sum into court for the satisfaction of said indebtedness against them."

A demurrer to the complaint was filed by the appellant, and on the same day it answered, setting up affirmatively its judgment recovered in the garnishment proceeding already referred to. Subsequently the lower court, all the parties being present, granted a temporary injunction, restraining both the appellant and also the firm of Bruhn & Henry from further proceedings in garnishment; and also made an order directing the respondents to pay the money which it was owing Bruhn & Henry into the registry of the court, which the respondents proceeded at once to do. Thereafter an issue was formed between appellant and the firm of Bruhn & Henry, and a judgment and decree entered by the lower court on July 13, 1895, adjudging the garnishment proceeding of the appellant against the respondents void and inoperative, and perpetually enjoining the appellant

Oct. 1896.] Opinion of the Court — GORDON, J.

from enforcing or collecting its judgment rendered therein or from taking any further proceedings thereon. Also that the defendants Bruhn & Henry were entitled to the fund paid into court. From this judgment and decree the Seattle Hardware Company has appealed.

Prior to the giving of notice of appeal, the court, further proceeding in said cause with all of the parties before it, made a further order and judgment directing the clerk of the court to pay to Bruhn & Henry the sum of \$833 from said fund. No exception was taken or reserved thereto by the appellant.

The sole ground relied upon for a reversal is that the complaint fails to state a cause of action. No question of jurisdiction is raised in the case. Counsel for the respondents insist that the appellant cannot be heard to urge this objection, claiming that it waived its demurrer in the lower court by neglecting to bring it on for hearing and by putting in an answer and proceeding to trial upon the merits. We think this contention must be sustained. The record fails to show that the attention of the lower court was ever called to the demurrer. It does not show that the appellant sought or obtained any ruling from the lower court thereon, but does show that it proceeded to litigate with the respondents, and the firm of Bruhn & Henry, upon the merits, in which litigation it was unsuccessful. Appellant insists that the Code (§ 193), permits it to raise the point here for the first time. The answer is that it raised it below by demurring and abandoned the point when it abandoned its demurrer.

Aside from this, however, we think the complaint is sufficient, at least as against an objection to it raised here for the first time. A complaint when so

attacked is entitled to be most liberally construed, and the judgment sustained if by any reasonable intentment it can be. *Johnson v. Leonhard*, 1 Wash. 564 (20 Pac. 591); *Lyen v. Bond*, 3 Wash. T. 407 (19 Pac. 35).

While it is true that the complaint shows that appellant had obtained a judgment in garnishment proceeding against respondents, it also showed that the validity of appellant's judgment was assailed by the rival claimant to the fund, who asserted that the judgment was void, and this, as already noticed, is precisely what the lower court found. We think that enough was stated in the complaint to make the case a proper one for interpleader under the statute.

Affirmed.

SCOTT and DUNBAR, JJ., concur.

ANDERS, J., concurs in the result.

[No. 2205. Decided October 2, 1896.]

THE PACIFIC LOUNGE AND MATTRESS COMPANY, *Respondent*, v. NICHOLAS RUDEBECK, *Appellant*.

SALE — WHEN TITLE PASSES — INTENTION — REPLEVIN.

In determining whether title has or has not passed by a contract of sale, the primary test is one of intention, and, if that is manifested clearly and unequivocally, it controls.

Where goods have been sold to a purchaser in consideration of an antecedent debt due him from the seller, although nothing in furtherance of the sale beyond the manifest intention of the parties to pass title has been done, replevin will lie at the instance of the purchaser against a third party, who holds the goods under a lease from the seller, which has been violated.

Appeal from Superior Court, Snohomish County. — Hon. JOHN C. DENNEY, Judge. Affirmed.

Black & Edwards, for appellant.

James B. Murphy, for respondent.

The opinion of the court was delivered by

DUNBAR, J.—This was an action in the nature of replevin, brought by the respondent against appellant to recover the possession of certain furniture and carpets described in the complaint. The complaint alleged that the respondent was the absolute owner of the goods in question, which was denied by the appellant. A verdict was rendered in favor of the respondent, on which judgment was entered and from which an appeal was taken.

Many errors are alleged by the appellant's brief, but according to appellant's own theory they are all involved in the determination of one question, viz., whether the respondent, according to the evidence, is the owner of the goods sued for or was in fact a mortgagee. It is contended by the appellant that the complaint shows that the respondent only held these goods as security for the payment of a debt due from one C. H. Bakeman. It may be said here that the goods were held under a lease from Bakeman to the appellant, which goods were afterwards sold by Bakeman to the respondent. Demand was made by it upon the appellant for the possession of the goods and upon refusal this action was brought.

We think the complaint states, in language which cannot be susceptible of two constructions, that the plaintiff is the owner and not the mortgagee of this property, and it seems to us that the evidence also conclusively shows an ownership in the respondent. The testimony of J. W. Efan, who was the agent of the respondent and who did its business for it, was to

the effect that respondent had purchased these goods outright from Mr. Bakeman, and that the intention was to convey the entire title of said goods to the respondent company. It seems that another arrangement had been made between the respondent and Bakeman, but the witness says:

“After talking the matter over with some of the other members of the company, we decided that the arrangement was unsatisfactory to us, and I saw Mr. Bakeman again and told him that the company wanted to buy the goods outright and take the absolute title thereto, and Mr. Bakeman agreed to sell the goods and I agreed to take them, and I bought them and closed the deal then and there as agent for the plaintiff.”

This testimony is undisputed, but it is the contention of the appellant that inasmuch as no credit was given Bakeman by the respondent, Bakeman being indebted to it at the time, and inasmuch as the price which was to be received by Bakeman under the contract was to be the price for which the goods were sold by the respondent, the title to the goods did not pass; that something remained yet to be done before the contract became executed.

While it is true that in many instances the test of an actual conveyance is the doing of everything which is to be done, yet under the modern authorities, at least, the doctrine of intention prevails, and where the intention of the contracting parties can be ascertained without doubt, no test is necessary and the property in the thing vests whether something else is to be done or not. The rule is thus announced in 21 Am. & Eng. Enc. Law, p. 478:

“In determining whether title has or has not passed by the contract, the primary consideration is one of intention. The agreement is what the parties intended to make it. If the intention is manifested

clearly and unequivocally, it controls. Thus, although it is a presumption of law that if something remains to be done for the purpose of testing the property, or of fixing the amount to be paid by weighing, measuring, or the like, or of putting the property into condition for final delivery, title does not pass until such act is done, yet this presumption may be overcome and title will pass if such appears by the contract to have been the intention of the parties."

This text is sustained by so many authorities that it is only necessary to refer to them as being cited in support of the text by the author quoted.

The testimony in this case so clearly showing the intention of the parties to convey this property, there is no room for the employment of the test spoken of above, and the judgment will therefore be affirmed.

HOYT, C. J., and SCOTT, ANDERS and GORDON, JJ., concur.

[No. 2269. Decided October 2, 1896.]

15	339
41	604

THE STATE OF WASHINGTON, *on the Relation of G. W. H. Davis*, v. THE SUPERIOR COURT OF PIERCE COUNTY.

CRIMINAL LAW—WRITS CORAM NOBIS—SUFFICIENCY OF SHOWING MADE.

Admitting, but not deciding, that the writ *coram nobis* might issue from a superior court of this state to inquire into certain alleged misstatements by the prosecuting witness upon the trial of a criminal cause, the petition therefor would not be sufficient when based upon the claim that the testimony of such witness "was not in accordance with the facts but was fraudulent and untrue."

Original Application for Prohibition.

G. W. H. Davis, for relator.

The opinion of the court was delivered by

GORDON, J.—Gus Roberts was convicted in the superior court of Pierce county of the crime of rape and sentenced to ten years' imprisonment in the penitentiary. Subsequently he filed in said court a petition in the nature of an application for a writ *coram nobis*, to inquire into certain alleged mis-statements made by the prosecuting witness, Ellen Schedin, upon the trial of the cause. His affidavit in support of the petition alleges that subsequent to his trial and conviction the prosecuting witness, in the presence of divers persons, stated and admitted that her testimony upon the trial was, upon material questions, false and mistakenly made, and he seeks to have such persons brought before the court and examined concerning her statements so made. The state demurred to the affidavit and petition in the lower court, and its demurrer was overruled and the petition set down for hearing. Thereupon the state applied for a writ of prohibition directed to the lower court, restraining it from further proceeding therein upon the ground that it has no jurisdiction.

Counsel for the state, upon the argument in this court, contended that the courts of this state are not vested with power to grant writs of this character. The record does not require us to determine that question, and as no briefs have been submitted by counsel in this case, in view of the importance of the question, we will not undertake to do so. If satisfied that the writ might issue in a proper case, we would nevertheless be constrained to hold the petition in the present case insufficient. It is based upon the claim that the testimony of the complaining witness in the trial of the criminal case "was not in accordance with the facts but was fraudulent and untrue." We have

been unable to find a case where the writ has been granted upon such showing, and upon principle we think that it ought not to be regarded as sufficient. The prosecutrix was a witness before the jury and sworn to testify truly. To receive her subsequent statement for the purpose of discrediting or impeaching the proceedings or judgment would be to open wide the door to fraud and lead to most baneful results. The law, upon considerations of public policy, will not receive the affidavit of a juror to impeach his verdict, and renders inadmissible the testimony of third persons as to what they heard jurors say in derogation of their verdict. Like considerations constrain us to hold that the remedy cannot be invoked upon a mere showing that the prosecuting witness has subsequently made contradictory statements or that she is now willing to swear that her former testimony upon the trial was false. Her latter oath is no more binding than her former one, and if the remedy sought exists in the jurisprudence of this state—a question which we do not now decide—it nevertheless must follow that it cannot be claimed upon a showing of the character here made.

The peremptory writ will issue.

HOYT, C. J., and DUNBAR, ANDERS and SCOTT, JJ., concur.

[No 2321. Decided October 2, 1896.]

A. V. FAWCETT v. THE SUPERIOR COURT OF THE
STATE OF WASHINGTON IN AND FOR PIERCE COUNTY.QUO WARRANTO—JUDGMENT OF OUSTER—EFFECT OF APPEAL—CON-
TEMPT.

The filing of a supersedeas bond under Laws 1893, p. 123, § 7, has the effect only of staying proceedings on the judgment, but does not operate to suspend or destroy the force and effect of the judgment itself. (Hoyt, C. J., dissents.)

A judgment of ouster in a proceeding in the nature of *quo warranto* divests the person ousted of all official authority whatever, and fully and completely excludes him from the office as long as the judgment remains in force.

A judgment in favor of a relator in a proceeding by information to try the title to a public office is, from its very nature, self-executing, and, without the aid of process or further action of the court, it accomplishes the object sought to be attained, so that there is nothing upon which a stay bond can operate, except an execution for costs. (Hoyt, C. J., dissents.)

Where one excluded from office by judgment of ouster refuses to yield possession on the ground that he has appealed from the judgment and filed a stay bond, and proceedings for contempt are instituted against him, he is not entitled to a writ of prohibition to restrain the court from further proceeding to punish him for contempt, inasmuch as he has a remedy by appeal from any judgment of conviction that may be rendered against him, and such proceeding for contempt is not for the purpose of enforcing the judgment of ouster, but is an independent proceeding to compel obedience to a lawful order of the superior court. (Hoyt, C. J., dissents.)

Original Application for Prohibition.

Hugh Farley, for relator.

Murray & Christian, and *J. S. Whitehouse*, for respondent.

The opinion of the court was delivered by

ANDERS, J.—At a municipal election held in the

15 342
15 377
15 699

15 342
19 12

15 342
22 592
15 342
31 484

15 342
32 699

15 342
37 280

Oct. 1896.]

Opinion of the Court—ANDERS, J.

city of Tacoma on the 7th day of April, 1896, the relator herein and one Edward S. Orr were opposing candidates for the office of mayor. Having received and canvassed the returns of the election, the city council determined and declared that Mr. Fawcett had received the highest number of votes cast for the office of mayor, and that he was entitled to the office, and thereupon caused a certificate of election to be issued and delivered to him. He thereupon entered upon the duties of the office and took possession of the books, papers and property belonging thereto. Soon thereafter Mr. Orr, claiming to have been elected notwithstanding the determination of the council to the contrary, filed an information in the nature of a *quo warranto* in the superior court of Pierce county to test the title to said office. Upon the trial of the issues presented by the pleadings in that proceeding it was adjudged that the relator Orr was entitled to the office, and a judgment of ouster was entered and the defendant, Fawcett, was ordered to deliver over all books, papers and property belonging to the same. Defendant Fawcett thereupon gave notice of an appeal to this court and, in due time, filed his appeal bond, after which he requested the judge of said court to fix the amount of a bond to stay proceedings on the judgment, which request the judge complied with, but distinctly ruled that he would not determine the effect of such bond, and that he would not make any ruling or decision as to the status of the parties or the litigation in case such bond should be given. Thereafter, Mr. Fawcett filed a bond in the sum designated by the court, and conditioned in accordance with the provisions of the statute. Subsequently Mr. Orr demanded possession of the office and of the property belonging thereto. Said demand was refused and said Fawcett

retained the possession of said office and said property, and continued to use and exercise the rights and privileges and to perform the duties appertaining to said office. The making of said demand, and the refusal thereof, was brought to the attention and knowledge of the judge of the superior court by complaint and affidavits, and such proceedings were had thereon that said Fawcett was ordered to show cause why he should not be arrested to answer for contempt for disobedience of the lawful order and judgment of said court. At this stage of the proceedings, said Fawcett caused to be issued out of this court an alternative writ of prohibition directed to said superior court and to W. H. Pritchard, judge thereof, requiring and commanding it and him to show cause why they should not be prohibited and restrained from further proceeding to punish said Fawcett for said alleged contempt of court.

The position of the relator herein seems to be that the bond which was filed in the *quo warranto* proceeding not only stays the proceedings but suspends the judgment of ouster, so that he may, pending the appeal, continue to exercise the functions of the office from which the judgment, by its terms, expressly excluded him. On the other hand, the respondent contends that a bond to stay proceedings, conditioned as required by law, will not stay or suspend a judgment rendered in a proceeding upon an information in the nature of a *quo warranto* to determine the title to a public office. Which one of these propositions is correct, is the first question for our determination.

Our statute (Laws 1893, p. 123, § 7) provides that,—

“An appeal shall not stay proceedings on the judgment or order appealed from or on any part thereof, unless the original or a subsequent appeal bond be

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further conditioned that the appellant will satisfy and perform the judgment or order appealed from in case it shall be affirmed, and any judgment or order which the supreme court may render or make, or order to be rendered or made by the superior court, and (where such condition is applicable) shall pay all rents of or damages to property accruing during the pendency of the appeal, out of the possession of which any respondent shall be kept by reason of the appeal."

This provision is quite general and comprehensive in its application, but it will be observed that it only prescribes what shall be the conditions of bonds which must be filed in order to stay proceedings on judgments and orders appealed from, and does not, either directly or by necessary implication, purport to suspend or destroy the force and effect of such judgments or orders. In fact, the only fair and reasonable implication from the language used is that it was the understanding and intention of the legislature that such judgments and orders should remain in force during the pendency of the appeal. The effect, then, of the appeal in the *quo warranto* case, after the statutory stay bond was filed, was to leave the proceedings in the same situation they were in at the time the appeal bond was filed, and the appeal became effectual. *Graves v. Maguire*, 6 Paige, 379; *Clark v. Clark*, 7 Paige, 607; *Burr v. Burr*, 10 Paige, 166; *First National Bank v. Rogers*, 13 Minn. 407 (97 Am. Dec. 239).

If, therefore, the judgment of ouster deprived Mr. Fawcett of the office of mayor, and if such judgment is, as the respondent claims, self-executing, he was not restored to his former official position by the filing of a bond to stay proceedings.

The question then is, what is the effect and nature of a judgment of ouster from a public office. It seems to be the settled rule that such a judgment divests

the person ousted of all official authority whatever, and fully and completely excludes him from the office as long as the judgment remains in force. High, Extraordinary Legal Remedies (2d ed.), § 756; Mecham, Public Officers, § 497.

And a judgment in favor of a relator in a proceeding by information to try the title to a public office is, from its very nature, self-executing. By its own force, and without the aid of process or further action of the court, it accomplishes the object sought to be attained. So far, then, as such a judgment is concerned, there is nothing upon which a stay bond can operate, except an execution for costs, where, as in this case, costs are awarded to the relator. As soon as the judgment was rendered in favor of Mr. Orr he became the mayor of the city of Tacoma and was entitled, by virtue of § 685 of the Code of Procedure, to proceed to exercise the functions of the office, after qualifying as required by law, unless the judgment was absolutely annulled by the filing of the stay bond. and we are clearly of the opinion, as already intimated, that it was not.

The result of permitting such a judgment to be suspended by an appeal and stay bond would, for obvious reasons, in many instances, in effect, completely destroy the relator's remedy. If such a result had been intended, or contemplated, by the legislature, they would, we think, have so stated, or at least would have required the filing of a bond by the appellant providing for the payment to the respondent of all damages sustained by reason of being deprived of the office during the pendency of the appeal, as they have done in cases where a respondent is kept out of the possession of property. The following authorities are in point on the questions here involved: *People v.*

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Stephenson, 98 Mich. 218 (57 N. W. 115); *State, ex rel. Craig, v. Woodson*, 128 Mo. 497 (31 S. W. 105); *Fylpaa v. Brown County* (S. D.), 62 N. W. 962; *Allen v. Robinson*, 17 Minn. 113; *Jayne v. Drorbaugh*, 63 Iowa, 711 (17 N. W. 433); *State, ex rel. Dodson, v. Meeker*, 19 Neb. 444 (27 N. W. 427); *Walls v. Palmer*, 64 Ind. 493; *Elliott*, Appellate Procedure, §§ 392-3.

In the case last cited the supreme court of Indiana ruled that a judgment suspending an attorney from practice executed itself, except as to costs, and that the granting of a supersedeas only suspended the right to enforce the collection of costs, and did not allow the attorney to practice pending the appeal. That is an interesting and instructive case, and the principle upon which the decision rests is equally applicable to the case at bar.

In *Jayne v. Drorbaugh*, *supra*, which was an action upon a supersedeas bond given in a proceeding to test the title to an office, the court held that the plaintiff, who was the successful party, had, under the statute of Iowa, which is almost identical with ours, the right to the possession of the office, and that the judgment was not suspended by the appeal and stay bond. The conditions of the bond in that case were substantially in the language of the bond now under consideration, and in the course of the opinion the court said :

“When it has been determined by the district or circuit court, in a proper proceeding, that a person is entitled to the possession of a civil office to which he claims to have been elected by the people, an appeal to this court should not have the effect to deprive such person of such office, pending the appeal, unless the statute in terms so provides. It is provided by statute that ‘an appeal shall not stay proceedings on the judgment,’ unless a bond is filed, conditioned as provided by law. Code, § 3186. The bond sued on is thus con-

ditioned. . . . We think, if the intent was that the bond and appeal should have the effect to prevent the plaintiff from taking possession of the office, the statute, in fixing the terms and conditions of the appeal bond would in clear and distinct terms have contained provisions to that effect. It is obvious, however, that it does not do so."

This language, in our judgment, is peculiarly applicable to this case. And, in *People v. Stevenson, supra*, the same rule was announced, under a statute as to stay bonds in terms fully as general as our own.

Nor are the views we have expressed opposed to the decisions of this court in *State, ex rel. Smith, v. Sachs*, 3 Wash. 96 (27 Pac. 1075), and in *State, ex rel. Bank, v. Superior Court*, 12 Wash. 677 (42 Pac. 123). In the first of these cases this court held that the party appealing had a right to file such a bond as the statute provided for, and that it was the duty of the judge of the trial court to fix the amount thereof, as required by law. But we expressly refrained from determining the effect of such bond upon the judgment appealed from. The judgment from which the appeal was taken in that case was final, and the appellant was adjudged to pay the costs, and he therefore had an undoubted right to arrest proceedings for costs at least, and, hence, to file the only bond provided by law for arresting or staying proceedings; and all that was actually decided in the case in 12th Washington, above mentioned, relating to the effect of bonds to stay proceedings, was that the provision of the statute as to such bonds applied to and stayed proceedings on the order then under consideration. The proceeding for contempt was not instituted for the purpose of enforcing the judgment of ouster, for, as we have seen, that judgment was already executed, but to com-

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pel obedience to a lawful order of the superior court. It was an independent proceeding in which the state was plaintiff (Code Proc., § 783), and although the judgment appealed from constituted evidence on which the court, in part, acted in making the order now sought to be prohibited, it was not a proceeding on the judgment, and hence was not stayed or suspended by the bond which was filed in the original case. *Welch v. Cook*, 7 How. Pr. 282.

And besides, if the relator herein should be found guilty of contempt, as alleged, he can appeal from the judgment of conviction, as in other cases, and have the proceeding reviewed by this court upon the merits.

From the foregoing considerations it follows that the peremptory writ must be denied, and it is so ordered.

SCOTT, DUNBAR and GORDON, JJ., concur.

HOYT, C. J. (*dissenting*).—I am unable to concur in the foregoing opinion, for while I must concede that the conclusions therein seem to be justified by the authorities cited in their support, I cannot free my mind from the opinion which I have long entertained, that it was the intention of the legislature, in providing for appeals from certain judgments and orders, that, except when otherwise expressly provided, the effect of an appeal should be not only to stay any affirmative action by which the judgment appealed from was sought to be enforced, but also to entirely suspend the force of such judgment during the pendency of the appeal. All the legislation upon the subject seems to indicate that such was the intention of the legislature. It has greatly extended the right of appeal and made it apply to

judgments and orders from which no appeal would lie except by virtue of express legislation. In many of these the right of appeal would be of little or no benefit if, during its pendency, the judgment or order appealed from should remain in force. That it has been the object of the legislature to not only thus enlarge the right of appeal but to provide fully for the protection of appellant's rights during its pendency is not disputed; but it is claimed that judgments or orders granting injunctions and judgments of ouster in proceedings in the nature of *quo warranto* are exceptions to the general rule. As to these it is claimed that, notwithstanding an appeal and the offer by the appellant to give a bond that shall amply protect the rights of the respondent, they will not be suspended but will remain in full force so that the appellant will be bound thereby as fully after he has perfected his appeal as before. I can see no sufficient reason for excepting judgments of this kind from the general rule. There would be greater reason for excepting judgments or orders granting injunctions from the general rule than there would for so excepting judgments of ouster; but if it had been the intention of the legislature that such judgments or orders should be excepted, there would have been little reason in extending the right of appeal to orders granting temporary injunctions. If the effect of an appeal from an order of this kind was not to suspend it so that it would no longer bind the appellant, he could derive no benefit from an appeal therefrom. Before such appeal could be determined the case would, under ordinary circumstances, have been tried upon its merits, and a final judgment rendered.

But it is said that if a judgment of this kind could be suspended, the relator would be deprived of any

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substantial benefit of his proceeding, for the reason that before the appeal could be prosecuted to a final determination the term of office over which the contention was being waged would have terminated. But this argument loses sight of the fact that the court would require such a bond as would amply protect the respondent. Beside, less hardship and uncertainty, not only to the contestants but to the public, would flow from the rule which allows the judgment to be suspended than from the contrary one. If the judgment is not suspended it may well happen that the person declared elected to the office may go into possession thereof and in a few weeks be compelled to surrender it by reason of a judgment of ouster in the superior court, and in a few months more be reinstated therein by reason of the reversal of such judgment of ouster.

Public policy will be best subserved by such a construction of the legislation as to appeals as will make the rights of appellants in all classes of cases as nearly uniform as circumstances will allow. When a general rule exists it should be applied to every case possible, and exceptions should only be recognized when they have been expressly provided for or are absolutely necessary to the protection of the rights of parties.

There is a suggestion in the majority opinion as to the right of the appellant to appeal from any judgment which may be rendered in the contempt proceedings. If by what is said it is intended to intimate that by reason of the fact that an appeal will lie from the judgment in such contempt proceedings, prohibition against the superior court should not be allowed even though it was proceeding without jurisdiction, I cannot agree to such intimation. To hold that a de-

fendant must obey a judgment which he is satisfied is of no force against him or take the chances of being punished by fine and imprisonment for violating it, if it eventuates that he is mistaken, is to establish a rule which may result in great oppression. A sensitive person might prefer to suffer in silence by reason of a judgment which he believed to be void rather than take the risk of being imprisoned for violating it, if it should afterwards be held to be in force. Hence the fact that the defendant may appeal from a judgment rendered in a contempt proceeding does not render such an appeal an adequate remedy. Beside, this question has been so often decided by this court adversely to the position intimated in the majority opinion that it should now be treated as *stare decisis*.

[No 2296. Decided October 2, 1896.]

PHILIP M. ISENSEE *et ux.*, Respondents, v. THOMAS C. AUSTIN *et al.*, Appellants.

15	363
29	432

MORTGAGES — SUBROGATION — JUDGMENT — RES JUDICATA.

A person who has assumed and agreed to pay a mortgage cannot, upon making the payment, be subrogated to the rights of the mortgagee.

A valid judgment for plaintiff finally negatives every defense that might and should have been raised against the action, for the purpose of every subsequent suit between the same parties or their privies in reference to the same subject matter.

The assignees of a contract are barred by the rule of *res judicata* from maintaining a suit to be subrogated to the rights of the mortgagee in a certain mortgage, which they had agreed to pay in part consideration of their contract, by reason of over payments on such contract, when judgment has already been obtained against their assignors canceling the contract for non-performance, and such rights as the assignees now claim would have been available as a defense by their assignors in the former action.

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Appeal from Superior Court, Whatcom County.—
Hon. JOHN R. WINN, Judge. Reversed.

Black & Leaming, for appellants :

A person cannot be subrogated to the benefits of a mortgage the payment of which he has assumed. Sheldon, Subrogation (2d ed.), § 46; 3 Pomeroy, Equity Jurisprudence (1st ed.), §§ 1206, 1212, 1213; 1 Jones, Mortgages (3d ed.), § 743; *Birke v. Abbott*, 103 Ind. 1 (53 Am. Rep. 474); *Wadsworth v. Williams*, 100 Mass. 126; *Putnam v. Collamore*, 120 Mass. 454; *Carlton v. Jackson*, 121 Mass. 592; *Reed v. Sycks*, 27 Ohio St. 285; *Johnson v. Walter*, 60 Iowa, 315; *Russell v. Pistor*, 7 N. Y. 171 (57 Am. Dec. 509); *Winans v. Wilkie*, 41 Mich. 264; *Bertrain v. Cook*, 32 Mich. 518; *Richardson v. Traver*, 112 U. S. 423.

S. M. Bruce, and *Brown & Cleveland*, for respondents :

Assumption of mortgage is no objection to subrogation. *James v. Burbridge*, 33 W. Va. 272; *Blodget v. Hitt*, 29 Wis. 170; *Watson v. Gardner*, 119 Ill. 312; *Young v. Morgan*, 89 Ill. 199; *Matzen v. Shaeffer*, 65 Cal. 81; *Cameron v. Holenshale*, 1 Cin. Sup. Ct. 83.

The opinion of the court was delivered by

DUNBAR, J.—This is an action brought to subrogate the respondents to the rights of the mortgagees of a certain mortgage. The defendants, appellants here, and others of the Austin family, the parties of the second part and who were owners of the timber in question, entered into a contract with John K. Rae and P. M. Isensee, whereby the parties of the first part granted to the parties of the second part the right, privilege and authority to at all times, for a period of

five years from the date of the contract, go upon the land described and cut thereon and remove therefrom all merchantable timber excepting that which was adapted to shingle bolts solely, on conditions therein named. The action was brought by the respondents, Philip M. Isensee and Lena Isensee, as successors in interest of the original contracting parties, P. M. Isensee and John K. Rae. At the time this contract was made the land was covered by certain mortgages, among which was one for the sum of \$2,000 to the Puget Sound Trust and Banking Company, said mortgage having been executed by Henry Austin and wife. Under the terms of the contract material to be noticed here, the parties of the second part agreed to pay in cash at date of signing contract \$1,000, which amount was paid; to further pay one dollar a thousand feet for each thousand feet of merchantable timber upon the land, payments to be made each thirty days, for the timber removed during the preceding thirty days. They further agreed to assume the payment of, and did assume the payment of, certain mortgages, among which was the one first above mentioned, together with all interest to come due on said mortgages, and agreed to pay the interest on said mortgages as they fell due, irrespective of whether any money was due from the parties of the second part to the first party at said time or times. The mortgages provided that the maturing of the interest and its non-payment at time of maturity should mature the principal.

The mortgage to the trust company was paid by Rae and Isensee as per contract agreement. Rae afterwards conveyed his interest in the contract to Lena Isensee. Isensee afterwards became involved, and on September 7, 1893, Isensee and wife conveyed to John H. Stenger their interest in the contract and in all the

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logs and logging outfit owned by them. Stenger failed to comply with the provisions of the contract, and on March 12, 1894, the parties of the first part to the contract commenced an action against John H. Stenger for the specific performance of the contract, the allegations being that the logging had been abandoned; that the payments called for by the contract were not being made by the owners of the contract, and the mortgages assumed were in default. The decree entered by the court in that action directed the defendants to within thirty days specifically perform said contract in so far as the said contract provides for the payment by the parties of the second part named in said contract of all moneys due upon the certain mortgages mentioned in said contract. It also further provided that, in the event of the failure to specifically perform as in the decree ordered, the contract should be canceled and the record thereof discharged. On July 12, 1894, it appearing to the court that the defendant had failed to perform in obedience to the decree of the court, the court entered a final decree canceling the contract. Subsequently Stenger transferred to Isensee and wife the contract in question and all the rights of said Stenger thereunder, and this action is brought by Isensee and wife who claim that the payments made under the contract exceeded the amount that is represented by the timber cut at the rate of one dollar per thousand feet, and the thousand dollars paid down, and that inasmuch as one of the payments so made under the contract consisted of the payment of the \$2,000 mortgage before mentioned, they should be subrogated to the rights of the trust company and should be entitled to foreclose this mortgage for their benefit to the amount of the claimed over-payment and enforce the lien foreclosed against the lien covered

by the mortgage. The court found that there had been an over-payment, and entered judgment in accordance with the prayer of the complaint, for the amount so found.

Many errors are assigned by the appellants, viz.: 1st, defect of parties defendant; 2d, insufficient proofs to establish the fact of over-payment; 3d, the termination by a former decree of any rights respondents may have had under the contract; 4th, that Isensee could not be subrogated to the benefits of the mortgage by him paid, for the reason that by the contract he assumed the payment of the mortgage in question and made it his own obligation, and made the payment by reason of his contractual obligation so to do from considerations moving to himself.

From the view we take of the last two propositions it will not be necessary to discuss the first two. We think the authorities universally sustain the proposition that a person cannot be subrogated when he pays an incumbrance which he has agreed to pay. In fact this proposition of law is not very stoutly disputed, if disputed at all, by the respondents; but they claim that the court found that the mortgage was paid at the request of Thomas C. Austin. This, indeed, is the finding of the court, but this finding was excepted to and we are satisfied that the finding is unfounded. The parties of the second part had agreed to pay this mortgage. It was one of the affirmative conditions of their contract, and we are satisfied from the proof that that they made the payment by reason of their contractual liability and for no other reason.

But, however this may be, we think the third objection raised by the appellants is absolutely conclusive of this case, viz., that the former decree terminated the rights of the parties to this contract. The

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general rule is thus stated by Black on Judgments, § 754:

“It is a general rule that a valid judgment for the plaintiff definitely and finally negatives every defense that might and should have been raised against the action; and this is true, not only with respect to further or supplementary proceedings in the same cause, but for the purposes of every subsequent suit between the same parties, whether founded upon the same or a different cause of action. A party cannot re-litigate matters which he might have interposed, but failed to do in a prior action between the same parties or their privies in reference to the same subject matter.”

This rule has become firmly established in the United States, and applying it to this case, if the parties of the second part to this contract had a right to plead over-payment by reason of their subrogation to the rights of the trust company, that right existed in the action between the appellants and Stenger and should have been there adjudicated. In that suit the contract was canceled. If there was any reason why the contract should not be canceled and if the defense urged here could be substantiated, it should not have been canceled, and that defense should have been urged in the former trial, and, not having been urged, it is lost.

But it is argued by the respondents that, while the rule above announced may be correct, it has no application to this case for the reason that the rule is coupled with a provision that the parties to the former action must be the same parties to this action. They are substantially the same parties. The meaning of the law is that they shall be the same parties in interest, not necessarily the same parties in name. In this case the parties in interest were the parties of the first part to the contract and the parties of the second

part to the contract or their assignees. The parties appellant here are entitled to all the rights and defenses which Stenger was entitled to, and none other, and if this plea was not available to Stenger, it was not available to his assignees.

The case of *Wilkes v. Davies*, 8 Wash. 112 (35 Pac. 611), lays down a rule on the subject of *res adjudicata*, which would be decisive of this case against respondents' contention. In fact it is not necessary to go nearly so far in this case to hold the former action an estoppel or bar to the present one as the court went in that case.

The judgment will therefore be reversed and the cause dismissed.

HOYT, C. J., and SCOTT and ANDERS, JJ., concur.

[No 2032. Decided October 3, 1896.]

W. E. JACOBS, *Respondent*, v. THE FIRST NATIONAL BANK OF PUYALLUP, *Appellant*.

PLEADING — VARIANCE — ESTOPPEL.

In an action which seeks to charge defendant as assignee of a written lease for a term of years, plaintiff should be non-suited when there is no proof that the assignment was in writing.

Matter claimed to operate as an estoppel must be pleaded in order to authorize its admission in evidence.

Appeal from Superior Court, Pierce County.—Hon. W. H. PRITCHARD, Judge. Reversed.

John P. Hartman, Jr., for appellant.

L. W. Hill, and *H. G. Rowland*, for respondent.

15	358
20	299
15	358
27	400

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The opinion of the court was delivered by

GORDON, J.—This appeal is from a judgment entered upon a verdict in favor of respondent (plaintiff) in the court below. The complaint is as follows:

“The plaintiff herein complaining of the defendants alleges:

“1. That the defendant herein is and at all times hereinafter mentioned has been a corporation, duly incorporated and existing under the banking laws of the United States, and doing business at the city of Puyallup, Pierce county, Washington.

“2. That the plaintiff herein on to-wit the 12th day of December, A. D. 1891, made, executed and delivered to one J. M. Ogle, then of the city, county and state aforesaid a certain lease to certain lands hereinafter described and a copy of which lease is hereto attached marked Exhibit (A) and made a part of this complaint.

“3. That on or about the 1st day of June, 1893, said J. M. Ogle transferred said lease to the defendant herein at which time said defendant took possession of said lands described in said lease assuming the conditions and obligations of the said J. M. Ogle, as set forth therein.

“4. That according to the terms of the said lease, the said J. M. Ogle and by reason of the said assignment to the defendant herein the said defendant, became indebted to the plaintiff herein for the rent stipulated in said lease from the first day of March, 1893, to the first day of January, 1894, to-wit in the sum of five hundred dollars (\$500.00) and interest from said first day of January, 1894, in the sum of five dollars (\$5.00).

“5. That the lands herein described as being covered by said lease is as follows, ‘Certain lands owned by said plaintiff known as bottom land and containing the buildings and improvements and containing twenty-eight acres more or less of the northeast quarter of section thirty-five (35) and twenty-six (26)

being in township number twenty north of range four east, W. M., Pierce county, Washington.'

"6. That the plaintiff herein consented to the said transfer from the said J. M. Ogle to the defendant herein, and from said date of transfer have looked to the said defendant for the rents as set forth in said lease.

"7. That there is now due from the defendant to the plaintiff herein the sum of five hundred and five dollars (\$505.00) which said defendants refuse and neglect to pay although often requested so to do.

"Wherefore plaintiff prays that he may have judgment against said defendant and in his favor for the sum of five hundred and five dollars together with his costs and disbursements herein."

The lower court having denied a motion to make the complaint more definite and overruled a general demurrer thereto, the appellant answered, denying each and all of the allegations. Upon the trial which followed, it appeared that no written assignment of the lease had been made, and the court, over repeated objections on the part of appellant, permitted evidence to be introduced tending to show that appellant by its acts had led the respondent to believe that the lease had been assigned, and that it assumed the obligations of an assignee, and entered into possession and held the same for several months, during which time it removed the nursery stock thereon belonging to Ogle and sold the same for the purpose of applying the proceeds upon a debt owing to it by Ogle. A motion for non-suit was made and overruled, and this ruling having been duly excepted to, presents the principal question arising in the case.

It is urged by appellant that the respondent, having by its complaint sought to charge appellant as an assignee of a written lease for a term of years, was required to prove an assignment in writing; that an oral

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assignment, if proved, would be within the statute of frauds and void, and that the respondent had failed to prove a sufficient cause for the jury. We think that the learned counsel for the respondent wholly fails to meet the objections. In his brief he says :

“The contract upon which this action was brought was not within the statute of frauds and was not required to be in writing. It was a *promise made by the defendant bank*, not for the purpose of becoming a mere surety for Ogle, but for the purpose of *advancing its own interest that they might get possession of the nursery stock*; there was a consideration for the promise; the use of the premises, plaintiff's forbearance to hold the stock for rent and allowing the defendant to take and remove the same. *Such an agreement is not within the statute of frauds but is an original contract.*”

We think counsel overlooks the fact that his complaint is not based upon any such contract as he here refers to. No offer or attempt was made to amend the complaint, and as it is elementary that a party must prevail according to the case made by his pleading, or not at all, it follows that a non-suit should have been granted.

Respondent further contends that the acts of the appellant were such as to lead him to believe that an assignment in writing had in fact been executed by Ogle to the appellant, and that the appellant is estopped to deny the assignment. To uphold this contention would be to permit a recovery upon a different case than that made in the pleading, and hold appellant liable for its acts without reference to the complaint. The rule is well settled that to authorize its admission in evidence the matter claimed to operate as an estoppel must be pleaded. *Phillips v. Van Schaick*, 37 Iowa, 229; *Walker v. Baxter*, 6 Wash. 244 (33 Pac. 426), and authorities there cited.

The judgment appealed from will be reversed and the cause remanded with instructions to the lower court to proceed in accordance with this opinion.

HOYT, C. J., and ANDERS, J., concur.

DUNBAR, J., dissents.

[No 2118. Decided October 3, 1896.]

LOUIS OTTISON, *Respondent*, v. A. G. EDMONDS *et al.*,
Defendants, DANIEL KERN, *Appellant*.

PARTNERSHIP — EVIDENCE — SPECIAL VERDICT.

In an action against several persons on the theory that they are co-partners in the quarrying business, which relation they deny, the general verdict of the jury against them should be set aside, when the special verdict of the jury finds such partnership as having been entered into at a certain time and place, based upon a memorandum in evidence, which has none of the elements of a contract of partnership but is a unilateral agreement whereby certain lands are leased to defendants for quarrying purposes, there being no evidence showing the presence of all the alleged partners at the time and place such agreement was found by the jury to have been entered into.

Appeal from Superior Court, Clarke County.—Hon.
A. L. MILLER, Judge. Reversed.

N. H. Bloomfield, for appellant.

W. W. McCredie, for respondent.

The opinion of the court was delivered by

GORDON, J.—Respondent brought this action against A. G. Edmonds, C. Anderson and Daniel Kern, as partners under the firm name of Edmonds & Co., to recover for labor alleged to have been performed for said firm of Edmonds & Co., by respondent and his

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assignors. The appellant Daniel Kern answered separately, denying generally all of the allegations of the complaint and specially denying that he was at any time a partner of the other defendants. From a judgment against the appellant upon the verdict of a jury, and an order denying his motion for a new trial, he has appealed.

Practically the only question involved in the issue submitted to the jury was whether appellant Kern was a partner in the firm for which plaintiff and his assignors worked. The contention of the appellant in this court and in the trial below was that Anderson and Edmonds were partners under the name of Edmonds & Co., engaged in getting out rock in what was known as the "Jenny Creek Quarry," near Lewis river in Clarke county, and as such partners they entered into a contract with appellant—a street contractor in the city of Portland—to furnish him rock. Upon the trial of the cause appellant and Anderson testified that there was no partnership between the defendants, but that Anderson and Edmonds alone were partners. On behalf of respondent there was the testimony of Edmonds and his wife to the fact of a partnership between all of the defendants, and in support of their respective contentions various circumstances were shown which it was proper for the jury to weigh and consider; but, inasmuch as we have concluded that the cause must be retried, we deem it improper to dwell upon them. It is sufficient to say that upon this main question in the case the evidence was very conflicting.

In addition to the general verdict, the jury, under the direction of the court, returned the following special findings, viz.:

"1st. Did the defendant Kern ever enter into a

partnership with Edmonds and Anderson, or either of them, if so when and where was this agreement made?

"A. Lewis River, Wash., June 3, 1892."

"2nd. Did the defendant Kern ever agree with Edmonds and Anderson or either of them to share with them in the profits of the stone quarry business at Lewis River, and if so when and where was any such agreement entered into between them, and who was present at the time?

"A. At Lewis River, June 3, 1892; John Shute, A. G. Edmonds, Daniel Kern and C. Anderson."

There was no evidence submitted at the trial in any wise tending to show that the appellant Kern was at Lewis River, Washington, on June 3, 1892, but respondent put in evidence the following paper or memorandum:

"LOUIS RIVER, Wash., June 3rd, 1892.

"This agreement of lease made and entered this third day of June, 1892, by and between John Shute, of the first part, and A. G. Edmonds and Daniel Kern and C. Anderson, parties of the second part, for and in consideration hereinafter expressed. Parties of the second part shall have the right to enter in to party of the first part property on Jenny Creek and open quarrys for to get out any and all kinds of stone, for building and paving purposes, and shall have and hold the said quarrys and canyon for the term of ten years; and the first year to be free of charge and thereafter to pay to party of the first part, the sum of five dollars per scow load, holding twenty-five thousand paving blocks; and the sum of four dollars per scow load of building stone; the said to be equal in weight to the aforesaid scow load of paving blocks. The party of the second part is to have the right to use all timber necessary for building the tramway, or wagon road to said quarry, and also to build the said road on either side of said creek or canyon, on the first party's property. The party of the first part.

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shall have the right, if the second party fails to work the said quarry for one year, to take the same out of their hands and claim it as his own property, and the lease of said quarry and canyon to be null and void.

“(Signed)

JOHN SHUTTE.”

It is apparent therefore that the special findings of the jury, that the partnership was entered into at the place and time mentioned in their answers, were based upon the assumption that the foregoing memorandum constituted a partnership agreement binding upon the appellant. It needs neither argument nor citation of authority to show that this assumption was erroneous and the jury mistaken. Indeed, the testimony of Edmonds himself was that the partnership was formed on the streets of Portland at a different date. The finding of the jury must be accepted as it was given, viz., that the partnership was entered into at Lewis River, Washington, on June 3, 1892; and as such finding is clearly based upon a misconception of the character of the paper signed by Shutte above set out, and the finding wholly without evidence to support it, it follows that the verdict must be set aside and a new trial awarded. It is no answer to the contention of the appellant to say that there was other evidence upon which the jury might have based their finding that a partnership existed between the defendants. It is sufficient to say that they have not done so, but accepted, as sufficient proof for that purpose, something which in law is wholly insufficient. It is clear that they attached an importance to the paper which did not belong to it, and gave it weight when it was entitled to none. What their verdict would have been had they not labored under such mistake cannot be told, and in view of the conflicting evidence it is forbidden that we should assume to say.

Sec. 376 of the Code provides that "when a special finding of facts shall be inconsistent with the general verdict, the former shall control the latter, and the court shall give judgment accordingly." It follows that a new trial must be awarded.

Reversed.

HOYT, C. J., and ANDERS and DUNBAR, JJ., concur.

[No 2283. Decided October 3, 1896.]

THE STATE OF WASHINGTON *on the Relation of Dietrich Stockman*, v. THE SUPERIOR COURT OF SPOKANE COUNTY, *Norman Buck, Judge*.

VENUE — APPLICATION FOR CHANGE — WAIVER.

A party entitled to a change of venue under Code Proc., § 162, because sued in a county other than that of his residence, does not, after having made proper demand for change, waive his right thereto by failing to appear at the time a ruling is had upon his application.

Original Application for Mandamus.

Staser & Holcomb, for relator.

W. A. Lewis, for respondent.

Per Curiam.—The relator was sued in the superior court of Spokane county, but was a resident of Adams county and was served there. He appeared and filed a demurrer and also an affidavit of merits, which contained a demand that the case be tried in Adams county, but no ruling was had thereon at the time. A few days later the court denied the application for a transfer; whereupon the relator applied for this writ and the court was ordered to transfer the cause to

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Syllabus.

Adams county or show cause why the same should not be done, and other proceedings were stayed therein meanwhile.

Respondent has returned that the application for a change of venue was refused because the defendant had waived his right to a transfer; but it appears that what the court construed to be a waiver was the failure of the defendant to appear at the time the ruling was had. It was not necessary for the defendant to be present at that time. Nor does it appear that he had any notice of the time when the matter would be called up. The statute (Code Proc. § 162) is explicit. It provides for the filing of an affidavit of merits and a demand for a change of venue when the defendant appears and pleads. This was complied with and the court had only one duty to perform; that was to grant the change.

It is directed that the peremptory writ issue.

[No. 2235. Decided October 6, 1896.]

DWIGHT PHELPS, *Appellant*, v. THE CITY OF TACOMA,
Respondent.

APPEAL — ASSIGNMENT OF ERROR — MUNICIPAL CORPORATIONS — POWER
TO REFUND MONEY RECEIVED FROM ILLEGAL TAX SALES — VOLUNTARY
PAYMENT.

An assignment of error that the court erred in overruling a demurrer to an answer is sufficiently definite, especially when the court in so ruling does not disclose its reasons therefor.

Where a city has power under its charter to provide for the levy and collection of taxes, it has power to authorize the repayment of moneys paid into its treasury upon void tax sales.

Such city cannot, however, pass an ordinance which would relieve those who had purchased at void tax sales before the passage of the

ordinance, as such provisions, when applied to past tax sales, cannot be construed as included in the power given the city to regulate the assessment and collection of taxes.

Moneys paid for current taxes by the purchaser at a void tax sale, under the supposition that he had acquired title under such tax sale, fall under the rule that moneys voluntarily paid on account of taxes cannot be recovered.

Money paid into a city treasury under a void tax sale, which the city was authorized by ordinance to refund, did not become the absolute property of the city, and its repayment would not be the incurring of a debt, within the meaning of the constitutional provision forbidding cities to incur indebtedness beyond a certain limit.

Appeal from Superior Court, Pierce County.—Hon. WILLIAM H. PRITCHARD, Judge. Reversed.

B. F. Heuston, and *T. W. Hammond*, for appellant.

The constitutional provision against municipal indebtedness does not apply to the transactions out of which appellant's rights arise. *In re State Warrants*, 62 N. W. 104. The term "indebtedness," in this connection, means an agreement to pay money when no suitable provision has been made for the prompt discharge of the obligation. *State v. Atlantic City*, 9 Atl. 764; *Sackett v. New Albany*, 45 Am. Rep. 472; *Springfield v. Edwards*, 84 Ill. 626. The clear intent was to limit and restrict the power of the municipality as to any indebtedness or liability which it has discretion to incur or not to incur. *Lewis v. Widber*, 33 Pac. 1129; *Potter v. Douglas County*, 87 Mo. 239; *Rollins v. Lake County*, 34 Fed. 849. The same doctrine is acted upon by the supreme courts of Illinois, Iowa and some other states in holding cities liable for damages arising from negligent acts, although past the limit of indebtedness imposed by this prohibition. *Bloomington v. Perdue*, 99 Ill. 329; *Chicago v. Sexton*, 2 N. E. 263; *Bartle v. Des Moines*, 38 Iowa, 414. This court seems

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Argument of Counsel.

to recognize the same doctrine in *Soule v. Seattle*, 6 Wash. 315 (33 Pac. 1080.)

Under its charter, the city government is authorized to provide for levying and collecting taxes on real and personal property for corporate uses and purposes. The complaint alleges the power of the city thus to provide for the levy and collection of its taxes, and that the ordinance [providing for repayment of moneys paid on void tax sales] was passed "in pursuance and in aid of the power aforesaid to collect taxes upon real property." That legislation of this character is really in aid of the taxing power is illustrated by many authorities. Black, Tax Titles, §§ 463, 464, 477; *Wilson v. Butler County*, 42 N. W. 891. Again, a city which derives its sole power from an act of the legislature may exercise all the powers within the fair intent and purpose of its creation, which is reasonably proper to give effect to power expressly granted, and may choose means adapted to the end desired. 1 Dillon, Municipal Corporations, (3d ed.) § 91; *Supervisors v. O'Malley*, 2 N. W. 632.

It is claimed that at the time the first cause of action accrued the ordinance had not been passed, and hence the demurrer to the first cause of action should have been sustained. That such enactments may be made retroactive in effect is clear from the authorities. *Coles v. County*, 35 Minn. 127; *State v. Bruce*, 52 N. W. 971; Black, Tax Titles (2d ed.), § 480.

The third cause of action is based upon the right of one to recover money had and received by another under such circumstances as that in good conscience it ought not to be retained. Here there is no questionable tax paid at all. There was no longer any tax to be paid upon the premises. Whether volun-

tary or not, the payment was not a payment of a tax to the city, but a payment of money under a mistake of fact, where nothing at all was due to the city. Nor was the payment voluntary in contemplation of law. *Newport v. Ringo's Executrix*, 10 S. W. 2; *Wilson v. Butler County*, 42 N. W. 893; *Fremont, etc. R. R. Co. v. Holt County*, 45 N. W. 164; *Morrison v. Kelly*, 74 Am. Dec. 176; *Iowa R. L. Co. v. Guthrie*, 5 N. W. 522.

John Paul Judson, and *W. H. H. Kean* (*James Wickersham*, of counsel), for respondent:

Appellant purchased the property in question at a fair, open tax sale and paid his money to the city. The ordinance guaranteeing his investment was not passed for a year afterward. Under such facts the rule of *caveat emptor* is strictly and rigidly applied by the courts. *Black, Tax Titles* (2d ed.), § 463; *Cooley, Taxation* (2d ed.), p. 476 and note. No general rule of law will save appellant's first cause of action and he recognizes this by appealing to the ordinance. But this ordinance was not in existence when the cause accrued; further, it is *ultra vires* and void; and the city of Tacoma had no authority in its enabling act or charter to refund prior paid taxes out of the public funds. 1 *Dillon, Municipal Corporations* (4th ed.), § 457; 15 *Am. & Eng. Enc. Law*, p. 1100; *Becker v. Keokuk Waterworks*, 79 Iowa, 419 (18 Am. St. Rep. 377); *Hyde v. Supervisors*, 43 Wis. 129; *City of Logansport v. Humphrey*, 84 Ind. 467; *Dowell v. City of Portland*, 13 Ore. 248. A guaranty upon private investments, even in tax titles, is not within the ordinary administrative powers of a corporation, and requires a special legislative grant. *Carter v. Dubuque*, 35 Iowa, 416; *Louisiana State Bank v. Orleans Nav. Co.*, 3 La. An. 294; 1 *Dillon, Mun. Corp.* (4th ed.), § 471.

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The rule of *caveat emptor* applies; there is in such cases no implied power in the city council to pass an ordinance to warrant or defend tax titles. Cooley, Taxation (2d ed.), p. 818; *Lynde v. Melrose*, 10 Allen, 49; *Packard v. New Limerick*, 34 Me. 266; *Lyon County v. Goddard*, 22 Kan. 389.

In the third cause of action, a new feature of the case presents itself. After making the purchase at the sale as set out in the first and second causes, and on August 10, 1893, appellant voluntarily paid taxes assessed for prior years of 1890, 1891, upon the same property. The old rule of *caveat emptor* applies, and the cause falls squarely within the rule announced by the supreme court of Massachusetts in the case of *Lynde v. Melrose*, 92 Mass. 49. A mere voluntary payment of taxes cannot be recovered. Cooley, Taxation (2d ed.), p. 809; *Sears v. Marshall County*, 13 N. W. 755; *Dowell v. City of Portland*, 13 Ore. 248; *Montgomery v. Cowlitz County*, 14 Wash. 230; Black, Tax Titles (2d ed.), §§ 463-469.

The opinion of the court was delivered by

Hoyt, C. J.—Plaintiff sought to recover from the defendant upon three causes of action; two for money paid to the city upon certificates issued upon sales for void taxes, and one for money alleged to have been paid on account of a mistake of fact. Defendant, for answer to each of these causes of action, set up the fact that the city was indebted beyond the constitutional limit and for that reason could not be held liable to the plaintiff. To these answers a demurrer was interposed by the plaintiff, which was overruled by the court, and, the plaintiff electing to stand upon

such demurrer, judgment in favor of the defendant was entered as to each of the causes of action.

Errors are severally assigned upon the ruling of the court in overruling the demurrer to the answers to each of the three causes of action, and the first question presented for our consideration is as to the sufficiency of these assignments of error. Respondent cites many authorities in support of its contention that they are not sufficient, but in our opinion none of them are in point; for while it is true that some of them state in general terms that an error alleged generally upon a pleading or other paper, a part of the record, is insufficient, none of them go to the extent of holding that an error which calls in question a single ruling of the court, in making which it was not called upon to assign any reason, is not sufficient. Under our practice a court in overruling a demurrer passes generally upon the sufficiency of the pleading demurred to, but there is nothing which requires it to in any manner disclose to the parties why the demurrer is overruled, and in fact no reason could be given excepting that the pleading contains all the elements required. When the court sustains a demurrer to a pleading it might be proper for it to disclose in what particular the pleading is insufficient; but even that is not required. On account of these facts we think that when it is charged that the court erred in sustaining a demurrer to a particular cause of action, it is sufficiently definite, for the reason that the party may not be advised as to the particular part of the pleading which the court has found to be insufficient.

But whether or not this is so, an assignment of error which questions the correctness of a ruling of the superior court in overruling a demurrer must be

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held sufficient, for the reason that the effect of such ruling is to assert generally the sufficiency of the pleading, and it is impossible for the party assigning the error to state the reasons which controlled the court in thus holding.

The motion to dismiss must be denied.

The right to recover the money paid for the certificates issued upon the void tax sales is founded upon a certain ordinance passed by the city council on January 11, 1893, entitled :

“An ordinance for the cancellation of illegal or erroneously issued certificates of sales on unpaid and delinquent municipal taxes, and on street and sewer assessments, and prescribing the manner of refunding the money paid for such certificates and the interest thereon.”

This ordinance in terms applies to certificates theretofore as well as thereafter issued.

Under its charter the city had power to provide for the levy and collection of taxes, and thereunder we think it had power to provide that any one who should in the future pay money into the treasury upon a tax sale which was void, should be entitled to have the certificate issued upon such sale canceled and his money repaid by the treasurer. Such a provision might be necessary to induce purchases at tax sales, and in the judgment of the common council it might be a necessary part of the machinery for the assessment and collection of taxes.

One of the causes of action was founded upon a certificate issued after the passage of the ordinance, and as to that we think a cause of action against the city was stated. The other certificate was issued upon a sale made before the passage of the ordinance and fails to state a cause of action, if it was beyond the

power of the common council to provide relief to purchasers at tax sales made before the passage of the ordinance. We have seen that the authority to pass the ordinance could well be held to be incident to the right to regulate the assessment and collection of taxes, and we are unable to discover any other power conferred by the charter which would authorize the council to pass such an ordinance. We must, therefore, hold that the ordinance is valid only by reason of the fact that authority to pass it was included in the power to regulate the assessment and collection of taxes.

This being so, that portion of the ordinance which attempted to relieve those who had purchased at tax sales before its passage cannot be sustained. Under well settled rules of law they had obtained all they purchased whether the sales were valid or void. When they made their bid they took their risk as to that. Hence the city received the money upon the sale as its absolute property and owed no obligation whatever to the purchaser, even if the sale was absolutely void. It must follow that the provision authorizing the cancellation of the certificate issued at the sale and the re-payment of the money received therefor, when applied to past sales, was in no manner connected with the assessment and collection of taxes. Hence there was no power in the common council to make such application.

The other cause of action grew out of the fact that the plaintiff, supposing that he had title to the property in question by reason of the tax sales, paid other taxes which appeared upon the books of the city to be a charge thereon, but which were in fact not a legal charge upon the property. It is not contended that the right to recover the money so paid is directly

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founded upon the ordinance above referred to, but it is claimed that it was money received by the city which equity required it to return to the plaintiff. There is nothing tending to show that the payment was other than a voluntary one, and we are unable to discover anything in the facts alleged which would make this payment an exception to the general rule that moneys voluntarily paid on account of taxes can not be recovered; and since that is the well settled general rule, we must hold that the facts relating to this payment did not state a cause of action. As to this cause of action and the one founded upon the sale made before the passage of the ordinance in question the complaint was insufficient.

As to the other cause it was sufficient, and it is necessary to determine as to the sufficiency of the answer thereto, and under well settled rules it must be held insufficient. The money paid into the treasury upon the sale did not, under the ordinance referred to, become the absolute property of the city, and its repayment was not the incurring of a debt within the meaning of our constitutional provision (art. 8, § 6.) The case of *Richards v. Klickitat County*, 13 Wash. 509 (43 Pac. 647), while founded upon a different state of facts, clearly announced this principle.

For the error of the court in overruling the demurrer to the answer to this cause of action the judgment must be reversed and the cause remanded for further proceedings.

SCOTT, ANDERS and GORDON, JJ., concur.

[No. 2315. Decided October 6, 1896.]

THE STATE OF WASHINGTON, *on the Relation of Robert B. Mullen*, v. SUPERIOR COURT OF PIERCE COUNTY,
HON. JOHN C. STALLCUP, *Judge*.

QUO WARRANTO — JUDGMENT OF OUSTER — EFFECT OF APPEAL.

Where an appeal has been perfected, the superior court no longer has jurisdiction in the proceeding for the purposes of any action except those specially provided for in the act relating to appeals (Laws 1893, p. 119).

A judgment of ouster is not so suspended by an appeal therefrom as to entitle appellant to the possession of the office during the pendency of the appeal.

After an appeal has been perfected from a judgment of ouster, the superior court has no jurisdiction in that proceeding, on any ground, to order plaintiff, who had been placed in possession of the office, to surrender possession to defendant.

Original Application for Prohibition.

Claypool, Cushman & Cushman, and *Doolittle & Fogg*,
for relator.

Govnor Teats, and *John P. Judson*, for respondent.

Per Curiam.—Relator had obtained judgment in his favor in a proceeding in the nature of *quo warranto*, to test the title to an office, and thereunder had been placed in possession of the office. Thereafter the defendant in the proceeding, having perfected his appeal to this court, sought an order in the superior court requiring the relator to surrender possession of the office that he might again take possession thereof. To prohibit the superior court from taking such action this proceeding was instituted.

The grounds upon which it was alleged that the superior court was about to make the order were, first,

15	376
15	699
15	876
430	233
15	876
34	614

that the relator had been wrongfully placed in possession of the office; and second, that the judgment of ouster against the defendant had been suspended by the appeal and his right secured to retain possession of the office during its pendency. When the appeal was perfected the superior court had no jurisdiction to take any action in the proceeding except those specially provided for in the act relating to appeals, and the making of the threatened order was not included among those there provided for. Hence the superior court was without jurisdiction to make such order; and if the defendant was entitled to any relief, such relief could only be afforded him in this court, which alone had general jurisdiction of the proceeding after the appeal had been perfected.

The claim that the judgment of ouster was so suspended by the appeal that the defendant was entitled to the possession of the office during its pendency is negatived by the case of *Fawcett v. Superior Court*, ante, p. 342, just decided. Beside, if entitled to relief on account of such appeal, it could only be obtained in the superior court by an independent proceeding, for the reason that all jurisdiction as to the original proceeding had been taken from such court by the appeal.

The alternative writ must be made permanent.

[No. 1727. Decided October 9, 1896.]

JAMES P. DE MATTOS, *Appellant*, v. R. C. JORDAN *et al.*,
Respondents.

PRINCIPAL AND SURETY — BOND OF BUILDING CONTRACTOR — RELEASE
 OF SURETIES — RES JUDICATA — INSTRUCTIONS — DAMAGES.

The fact that, at the date a building contract bond was executed, the contractor had some men upon the premises engaged in work preparatory to the erection of the building, does not show a want of consideration for the bond, when there is no evidence showing that the contractor was in possession of the premises by direction or request of the owner, or that the giving of the bond was not an inducement to the signing of the contract on the part of the owner.

Sureties upon a building contractor's bond are not discharged by deviations from the specifications in the construction of the building, nor even by material alterations, when the contract itself permits such alterations.

Where a building contractor was to be paid monthly, as the work progressed, upon the supervising architect's estimate of the amount of work completed, the fact that the owner accepts an order from the contractor in favor of a material man and agrees to pay same, on the day the estimate becomes due, paying at the time in cash, however, a small percentage of the claim to accommodate the material man, does not constitute such a payment in advance as will release the sureties upon the contractor's bond.

Sureties upon a building contractor's bond are not entitled to be discharged because their principal was forced to pay his debts, by the acts of the obligee, as an attorney, in securing the collection of claims due from the principal out of moneys payable to him on the building contract.

The fact that the contractor was compelled, by the person with whom he had contracted for the erection of a building, to pay his debts due to other parties, would not constitute a valid excuse for his abandoning his contract.

In a suit upon a contractor's bond the defense of *res judicata* cannot be set up by reason of the fact that in a prior action one of the sureties had recovered judgment against the obligee for moneys advanced to pay laborers upon the obligee's promise to refund.

The plea of *res judicata* is not available as a defense where the parties to the action are not the same as in the one in which the judgment sought to be set up was rendered.

15	378
20	318
15	878
27	40
15	878
30	542
30	543

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A charge to the jury that the burden was on plaintiff to show what amount of damage he had suffered by reason of the failure of the contractor to complete the building in the time fixed by the contract and that they should allow him such amount as they found was established by the evidence, is not erroneous, when plaintiff has not specifically requested the court's construction as to whether the amount of damages for each day's delay was liquidated and fixed by the parties in their contract.

Although the owner who has been obliged to complete the construction of a building himself by reason of the abandonment of the contract by the contractor may be entitled to recover against the sureties upon the latter's bond, he can only recover for such of his expenses incurred for finishing the work as shall have been audited and certified by the architect, when the contract itself provides that the expenses incurred for materials and labor should be audited by the architect and that his certificate should be conclusive upon the parties.

Appeal from Superior Court, Whatcom County.—
HON. JOHN R. WINN, Judge. Reversed.

Kerr & McCord, and *Bruce, Brown & Cleveland*, for appellant.

Dorr, Hadley & Hadley, Fairchild & Rawson, and *Black & Leaming*, for respondents.

The opinion of the court was delivered by

ANDERS, J.—On April 30, 1890, the plaintiff entered into a contract with defendant Jordan whereby the latter agreed to furnish all material and to erect for the former, in the city of New Whatcom, a three-story and basement brick and stone building, in accordance with plans and specifications prepared by one W. A. Ritchie, supervising architect, and which were made a part of the contract. By the terms of the contract, the building was to be completed on or before August 30, and in default thereof the said contractor agreed to pay the owner \$50 as and for liquidated damages for every day that the work should

remain unfinished. The plaintiff agreed to pay to the contractor Jordan for the material and labor furnished, and the doing and completing of the work, the sum of \$23,659, good and lawful money of the United States, subject to additions or deductions on account of alterations, modifications or additions as provided for in the contract, payments to be made upon estimates on the first Tuesday of each month, covering all materials furnished and labor performed on the work during the month preceding, as computed by the architect, less twenty per cent. of the valuation of the work completed, and as certified by the architect, which was to be paid at the expiration of ten days after the completion and final acceptance of the work and the building. The contract provides that the contractor shall perform any work required in alteration, modification or addition, which the architect and owner shall demand as the work progresses, upon receiving written authority from the architect, approved by the owner, specifying the kinds and qualities, and in every such case the price for such alterations, modifications and additions must be agreed upon and a fair and reasonable valuation of the work shall be added to or be deducted from this contract price, and should any differences arise between the parties hereto respecting such valuation the same shall be decided by three experts, etc. And the specifications provide that no bills for extra work shall be allowed unless the same had been authorized by the owner and the architect. It is also stipulated in the contract that in case the contractor should not complete the building, the owner may do so and charge the expense to the contractor, and "the expense incurred by the owner as herein provided, either for furnishing materials or for finishing the

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work, shall be audited and certified by the architect, and his certificate thereof shall be conclusive upon the parties." Another stipulation in the contract was that should the architect, prior to each payment receive notice from any person or persons that they held a claim against the said building for material or labor chargeable to the contractor, for which, if established, the owner might be made liable, the owner should have the right to retain out of the payment then due, or thereafter to become due, an amount in addition to the twenty per cent. retained sufficient to indemnify him against such claims until the same should be actually satisfied and receipts in full for the same have been furnished by the contractor.

To secure the faithful performance of this contract the defendant Jordan, as principal, and the other defendants as sureties, executed to the plaintiff their joint and several bond in the sum of \$20,000, conditioned to be void, "if the said R. C. Jordan shall well and truly perform the said contract and shall erect and complete the said building in accordance with the said drawings, plans and specifications and the terms and conditions of that certain contract, and within the time therein mentioned, and shall pay all laborers, mechanics, material-men and persons who shall supply the said contractor with any materials, goods or labor of any kind, all just debts due or thereafter to become due such persons, incurred in carrying on this work."

Jordan entered upon the performance of the contract, but on August 7, 1890, he abandoned the work and absconded, leaving the building but partially constructed. The sureties having declined to finish the building at the request of the plaintiff, and having

notified the plaintiff that they denied and disclaimed all liability upon the bond for damage sustained through the failure of their principal Jordan to perform the conditions of his contract, plaintiff himself caused the building to be completed and subsequently brought this action upon the bond to recover the amount alleged to have been necessarily paid in excess of the contract price in finishing the building and for labor performed and materials furnished on account of the contractor; the amount of mechanics' and laborers' liens established against the building, and the damages caused by the failure of the contractor to complete the structure within the time limited by the contract.

The defendants filed separate answers, and the sureties defended on the alleged grounds that there was no consideration for the execution of the bond in controversy; that material changes were made and permitted by plaintiff in the building at an additional cost and in a manner not authorized by the contract, and without their knowledge or consent; that the plaintiff violated the conditions of the contract on his part by making payments in advance and without the certificate of the architect, and by compelling Jordan to accept as payments his own obligations whereby he was forced to abandon the work, (which latter defense was also interposed by Jordan); and that the questions involved in this action are *res judicata*, especially as to defendant Dibble.

The cause was tried to a jury and a general verdict was returned in favor of the defendants, and the jury also made and returned special findings upon certain questions of fact which were submitted to them by the court, at the instance of the defendants. A motion for a new trial was made and denied, after which judg-

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ment was rendered for the defendants upon the verdict, and the plaintiff appealed.

The facts found by the jury were that under the plans, specifications and contract the piers between the arches on Holly street and on Elk street were to be built of brick, but were constructed of stone; that the inner basement walls were to be of brick and the first twenty-four inches were of stone and the remainder of brick; that the height of the third story, as designated on the plans and specifications, was eleven feet ten inches, but as constructed was twelve feet two inches; that the third story was completed by appellant; that changes were made in the time, manner and form of payments by paying in advance of estimates and by paying in depreciated paper, and that the change from brick to stone in the construction of piers increased the cost of the building in the sum of \$335. No other special findings of facts were made or requested. The modifications or changes in the construction of the basement walls and of the piers occurred while the work was in charge of the contractor, but the change in the height of the ceiling of the third story was made after the abandonment of the contract by Jordan, and during the time when appellant was in charge of the construction.

Although the bond in question was dated May 1, it appears from the notarial certificate attached thereto that it was not acknowledged until the 8th of that month, and there is some evidence tending to show that it was not executed until the date last mentioned, and that at that time Jordan had some men upon the premises designated in the contract engaged in work preparatory to the erection of the building. Upon this evidence is based the claim of respondents that there was no consideration for the bond. This posi-

tion is not tenable. We find nothing in the evidence showing that Jordan was in possession of the premises by direction or request of appellant, or that the giving of the bond was not an inducement to the signing of the contract on the part of the appellant. On the contrary, it fairly appears from the testimony of appellant, which is not contradicted, that it was understood and intended that a bond should be given to secure the performance of the contract, and that, in fact, the contract was executed in duplicate and the duplicate copy which Jordan received was delivered to him at the time he delivered his bond to appellant. That being so, it cannot be said that the bond was executed without consideration.

There is no evidence tending to prove, and in fact it is not claimed, that there was any alteration of the plans and specifications as originally prepared. The changes which were made were mere deviations from them as the work progressed. Some other changes were made besides those mentioned in the special findings of the jury, while Jordan was directing the work. The height of the first story ceiling was diminished some two inches; two mantles were changed from wood to marble, and some other less material changes and modifications were also made.

Appellant contends (1) that these changes are, as matter of law, wholly immaterial, and that the court erred in submitting the defense based thereon to the jury; (2) that if material, the court erred in refusing to instruct the jury as requested by appellant, that if any changes were made it would be their duty to determine from the evidence the cost thereof and to deduct from or add the cost of the same to the contract price and render their verdict accordingly; and (3), that these changes were fully provided for by the

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terms of the contract, and there being no evidence to the contrary, the presumption of law was that they were made without in any manner affecting the contract price.

We have no doubt that the changes were material; nor that just such changes were contemplated by the contract, and, if they were made in accordance with it it follows that the instruction requested was right, and should have been given to the jury. Appellant testifies that the changes which were made while Jordan had control of the work were made without his knowledge or consent, and it is claimed on his behalf that Jordan thereby violated his contract and the sureties, if any one, are responsible therefor. On the other hand, the respondents insist that the supervising architect authorized the contractor to make the changes and that he and appellant ratified the same, the former by making and certifying his estimates to the contractor and the latter by paying such estimates. But the mere fact that appellant paid the estimates of the architect would not constitute a ratification of the acts of the architect or contractor unless at the time he had knowledge of those acts. Ratification always presupposes knowledge of the acts claimed to be ratified. By a provision of the contract the contractor was obliged, upon receiving written authority from the architect approved by the owner, to perform any work demanded by the owner and architect in the alteration, modification or addition, and it would therefore appear that without the approval of the owner the architect's authority would not justify the contractor in deviating from the plans and specifications. Moreover, this provision was for the benefit of appellant, and to protect him against unauthorized bills for extra work, and it affected the contractor only

in so far that he could collect nothing for additional work not authorized as provided by the agreement

But it is also claimed that appellant violated the contract by changing the height of the ceiling in the third story, and by omitting base mouldings called for by the plans and specifications, and by changing the glass in the inside doors and windows throughout the building from "obscure" or frosted to clear. But as the contractor, if he had not abandoned his contract, would have been obliged, under its terms, to make these changes at the request of the owner, we see no reason why the owner could not himself do the same thing after he undertook to finish the building in accordance with an express provision of the contract. All of the changes which were made in the progress of the work and which are here complained of were mere deviations from the specifications, and, as we have observed, were amply provided for by the contract, and therefore the making of them did not have the effect to discharge the sureties from their obligations on the bond. See: *Dorsey v. McGee*, 30 Neb. 657 (46 N. W. 1018); *Hayden v. Cook*, 34 Neb. 670 (52 N. W. 165); *McLennan v. Wellington*, 48 Kan. 756 (30 Pac. 183); *Howard County v. Baker*, 119 Mo. 397 (24 S. W. 200); *Ashenbroedel Club v. Finlay*, 53 Mo. App. 256.

And that being so, the instruction of the court to the jury on this branch of the case was, to say the least, misleading. The jury were charged that if such changes were made with the knowledge and consent of De Mattos and were material changes, and he failed to follow the plans and specifications so as to make it a different building, and did this contrary to the fifth paragraph of the contract, and had full knowledge of it, then he did not follow the conditions of the con-

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tract set up, and he would be held to make a breach of the contract himself; otherwise he would not. And also, that "if you should find in this case . . . that the building erected was changed upon an understanding between Jordan and De Mattos so that it was not the building contemplated by the parties, or the parts therein changed were not as contemplated by the parties under their contract, viewed in the light of the surroundings, then I instruct you that such a change would be material and substantial change, and the sureties would be discharged from any responsibility." It was the province of the court, and not of the jury, to construe the contract and determine what deviations from the plans and specifications were therein provided for; and, on the other hand, it was the sole province of the jury to determine what changes or deviations were actually made. But, under the instruction given, the jury might have deemed themselves at liberty to find for the defendants if, in their opinion, material changes were made with the knowledge and consent of plaintiff, or the plaintiff failed to follow the plans and specifications so as to make a different building from that contemplated by the contracting parties, or the parts changed were not as contemplated by the parties under the contract.

It cannot, we think, justly be said that the building erected was different from the one contemplated by the parties to the contract. In size, shape and internal arrangement it is in every respect in conformity with the contract and plans, and the fact that the deviations from the specifications were material can have no effect upon the obligations of the sureties, for the reason that material changes were provided for in the contract of their principal. The fact that the cost of alterations, modifications and additions was to

be added to, or deducted from, the contract price clearly shows that the changes provided for were not understood to be merely immaterial changes.

It is not claimed by respondents that appellant did not pay the contractor the whole amount due him under the terms of the contract, but they contend that the sureties are discharged for the alleged reason that appellant violated the contract by paying in advance and by paying in depreciated paper, and not in good and lawful money of the United States. It appears from the evidence that the contractor Jordan purchased a lot of brick from the agent of the Elliott Brick Company, during the month of June, which he did not pay for, but gave the seller an order on appellant for the amount due, \$1,672, requesting him to charge the same to the account of the payment falling due on the next succeeding estimate. Appellant accepted the order for \$1,572, payable July 1st, the day on which the estimate was due, and, as he says, to accommodate the brick man, paid him \$100, the balance of the order. The estimate was duly made, and the amount of the order deducted therefrom, and the balance, some \$3,800, was paid to the contractor. Did this transaction amount to making payment in advance of the estimate? Clearly not. It was not an advancement of any sum whatever to Jordan, and was not intended by him to be such, but was simply a request by him to pay the drawee, out of whatever sum might be due from appellant on the next estimate, an amount which he, Jordan, was obligated by his contract to pay for material furnished. See *Bell v. Paul*, 35 Neb. 240 (52 N. W. 1110).

Appellant, at the request of Jordan and with the approval of the architect, also paid for some eye-beams which had been ordered from Pennsylvania, and

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which were in the possession of the railroad company, and without which work could not proceed. But, under the circumstances, and in view of the provisions of the contract, the sureties had no ground of complaint on that account. The amount so paid was applied on an estimate actually made, and neither that, nor any other supposed advancement disclosed by the record, violated the contract or released the sureties from their obligation. See *Benjamin v. Hillard*, 23 How. 149.

In regard to the claim of respondents that appellant violated the contract in making payment in depreciated paper, the evidence discloses that appellant, who is an attorney had, before the making of the contract in question, received some claims in the form of promissory notes against Jordan for collection, and upon which he threatened to sue if they were not paid. These claims were finally compromised and paid by Jordan in cash, except the amount of fees which appellant was entitled to deduct therefrom. Appellant's charges, amounting to \$130, were, by an arrangement with Jordan, subsequently paid out of the sums due on estimates of the architect. In addition to the claims above mentioned appellant received for collection a judgment against Jordan. This claim was also compromised, and Jordan agreed that the amount to be paid (\$360) in full satisfaction thereof, might be deducted from the sum that would be due from appellant on the architect's estimate of September 2d following. Before that estimate became due, however, Jordan absconded, and nothing was ever paid by him on the judgment, or charged to his account by appellant. It will be seen from what we have stated that appellant did not pay Jordan in depreciated paper, or any other kind of paper. He

owned none of these claims against Jordan and did not pretend to own them. The \$130 paid by Jordan out of the estimates was due to Jordan's own creditors, appellant's clients, and was in fact paid to them. He owed appellant nothing and paid him nothing.

The question then is reduced to this, Are the respondents entitled to be discharged because appellant, as an attorney, was instrumental in causing their principal to pay his debts? We think there can be but one answer to this question, and that is, that they are not. In fact they would not have been discharged even if appellant had owned these notes and obligations, and Jordan had agreed to accept them as payment instead of money. See *Foster v. Gaston*, 123 Ind. 96 (23 N. E. 1092).

Moreover, the fact that Jordan was compelled, if he was compelled, to pay these debts, constituted no valid excuse for his abandoning his contract, and therefore it was error to instruct the jury that if Jordan was forced against his will to pay off other notes and contracts which he had obligated himself to pay, and was forced against his will to accept such as payments, and that was the cause of his giving up the contract, then that was a breach on the part of appellant, and no recovery could be had against the sureties.

It appears that after Jordan abandoned the work, Mr. Dibble, one of the defendants and sureties, paid a considerable sum of money to laborers employed by Jordan, and which was due them for labor performed on the building. Mr. Dibble subsequently sued appellant for the recovery of the amount so paid, and alleged in his complaint that the same was made at the request and for the use of appellant. Appellant's answer consisted of a general denial merely, and

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under it he, of course, had a right to prove any fact or facts which directly controverted any material allegation of the complaint. Upon the trial he did not attempt to disprove payment by Dibble, but undertook to prove that such payment was not made at his request, but voluntarily and because Dibble was a bondsman of Jordan. The trial resulted in a verdict and judgment for Mr. Dibble, and the judgment was affirmed, on appeal, by this court. See *Dibble v. DeMattos*, 8 Wash. 542 (36 Pac. 485). The amount of this judgment, which it is alleged is a lien upon appellant's building, is one of the items of damages sought to be recovered in this action; but the learned counsel for respondents insist not only that appellant is not entitled to recover the amount of that judgment, or any part thereof, but that he is estopped by the judgment from maintaining this action, for the alleged reason that the identical questions in issue here were involved in the action in which the judgment was rendered and were decided adversely to appellant.

We are unable to assent to this proposition. That Jordan had violated his contract with appellant, and that Dibble was one of the sureties on his bond, were facts which were not disputed or questioned on the trial of that action, and the question whether Dibble was in fact liable to appellant on his bond was not in issue and was not determined. The only question litigated and determined was whether Dibble paid the money for the recovery of which the action was instituted at the request and for the use of appellant. It is true that appellant, as corroborative of his own testimony that he did not request Dibble to pay the money for him and did not promise to re-pay it, and that Dibble was to be repaid, if at all, out of any

money that might be due to the contractor or sureties after the completion of the building, introduced evidence showing that Dibble was one of the contractor's sureties and that the contractor had failed to perform his contract. But we are not to conclude from that evidence that the jury must have determined that Dibble was not liable on his bond.

But there is another reason why the judgment in *Dibble v. DeMattos* ought not to estop appellant from maintaining this action, and that is, that the parties to this action are not the same. 1 Freeman, Judgments (4th ed.), § 161; 21 Am. & Eng. Enc. Law, p. 227.

If appellant had himself paid the bills due from Jordan for labor, which Dibble paid, there is no question but that he could have recovered the amount thereof from the respondents; and that being so, we perceive no reason why he should not recover the sum paid by Dibble for him, after refunding the sum so advanced.

The court charged the jury in substance that the burden was on the plaintiff to show what amount of damages he had suffered by reason of the failure of the contractor to complete the building in the time fixed by the contract, and that they should allow him such amount as they found was established by the evidence. We see no valid objection to this instruction. If appellant desired to have the court's construction of the contract as to whether the amount of damages for each day's delay was therein liquidated and fixed by the parties, he should have specifically requested it.

In view of the fact that a new trial must be awarded, we deem it proper to observe that appellant can, under the terms of the contract, only recover such of the expenses incurred by him for furnishing materials or

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finishing the work as shall have been audited and certified by the architect. No estimates of the architect were required after the contractor abandoned his contract, but it was explicitly agreed that the expenses incurred by the owner for materials and labor should be audited and certified by the architect and that his certificate should be conclusive upon the parties. The purpose of this provision was to protect the sureties against excessive and unjust charges for work and material, and it was agreed that the certificate of the architect should be conclusive as to the amount of expenses incurred by the owner. It is evident that in no event can appellant recover more than the amount of damage he has sustained by reason of the default of the contractor.

The judgment is reversed and the cause remanded for a new trial in accordance with this opinion.

HOYT, C. J., and DUNBAR, J., concur.

[No. 2191. Decided October 9, 1896.]

GEORGE F. GUND, *Appellant*, v. JAMES PARKE, *Defendant*, FANNIE M. PARKE, *Respondent*.

COMMUNITY PROPERTY — LIABILITY FOR HUSBAND'S DEBTS — INTERVENTION BY WIFE TO PROTECT.

In an action against the husband on his promissory note, the wife has a right to intervene, for the purpose of having any judgment that may be rendered against the husband adjudge that the debt was not a community debt and that it should not be satisfied out of the community real property.

A promissory note made to evidence a debt which is not for the benefit of the community cannot be collected out of community real estate, although the note may have passed into the hands of a *bona fide* purchaser for value before maturity.

15	393
16	649
15	393
29	222

A judgment against a husband on account of his separate indebtedness is enforceable against the community personal property.

Appeal from Superior Court, King County.—Hon. RICHARD OSBORN, Judge. Modified.

Allen & Powell, for appellant :

The wife showed no right to intervene, and plaintiff's demurrer to her complaint, and his objection to the introduction of testimony in its support, should have been sustained. Her right to intervene cannot be sustained on the ground that she has the right to protect the community lands from the cloud of a judgment. For the plaintiff is seeking no relief against the community or its lands. "The matter in litigation" is not the question of how the husband's liability shall be satisfied, but whether there is such a liability. *Lewis v. Lewis*, 10 N. W. 586; *Bennett v. Whitcomb*, 25 Minn. 148; *Gasquet v. Johnson*, 1 La. 425; *Horn v. Volcano Water Co.*, 18 Cal. 141; *Taylor v. Adair*, 22 Iowa, 279; *State v. Superior Court*, 7 Wash. 77; *Smith v. Gale*, 144 U. S. 509. Even if the husband should fail to pay the judgment, it would not constitute a cloud upon any land in which the wife is interested, unless land standing in his name is in fact not his separate property but community property. The intervention complaint, therefore, brings in issue not only the character of the debt but the title to the land. An intervenor cannot so change the issues. *Loving v. Edes*, 8 Iowa, 427; *Meyer v. Stahr*, 35 La. An. 57; *Whitman v. Willis*, 51 Tex. 421; *Pool v. Sanford*, 52 Tex. 621.

White, Munday & Fulton, and *Greene, Turner & Lewis*, for respondents.

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The opinion of the court was delivered by

DUNBAR, J.—Plaintiff and appellant loaned to one F. L. Stinson the sum of \$3,000 and took as collateral security therefor his promissory note for \$3,500, payable to Stinson and signed by Stinson and Parke and L. C. Gilman. This action was brought on the collateral note to collect a judgment against Parke only. Fannie M. Parke, wife of the defendant, filed a complaint in intervention in which she alleged that she and defendant were the owners of community real property in King county, Washington; that the note sued on was a separate debt of the defendant and not a community debt, and that a judgment rendered thereon against her husband, the defendant, would be a cloud upon the community land. Her prayer was that any judgment that should be rendered against him should adjudge that the debt was not a community debt and that it should not be satisfied out of the community property. To this complaint in intervention the plaintiff demurred on the ground that the same did not state facts sufficient to constitute a ground for intervention. The court overruled the demurrer. At the close of the evidence the court withdrew the case from the consideration of the jury and directed a judgment to be entered in favor of the plaintiff against the defendant, and further directed that the judgment should adjudge that the debt was a separate debt of defendant, and that it was not to be satisfied out of the community property. Judgment was entered accordingly and an appeal was taken from so much of the decree as adjudged that the debt was not a community debt, and that it should not be satisfied out of the community property.

It is urged by the appellant that the wife showed no right to intervene because she had no interest in the

matter in litigation; that the matter in litigation was the husband's indebtedness to the plaintiff; that the plaintiff was not seeking relief against the community property or its lands; that the question in litigation was not the question of how the husband's liability should be satisfied, but whether there was such a liability. It was held by this court in *McDonough v. Craig*, 10 Wash. 239 (38 Pac. 1034), that in an action upon a negotiable promissory note executed by the husband alone for what was alleged to be a community debt, the wife was a proper defendant; and upon a finding in favor of the defendant upon such issue he was entitled to have the debt adjudged as that of the community. This case overruled the rule of practice which had been announced theretofore by the court in *Commercial Bank v. Scott*, 6 Wash. 499 (33 Pac. 829), and we think the logic of *McDonough v. Craig* would permit the intervention of the wife and the determination of the liability of the community property before judgment as well as after. The court in that case said:

"This leaves for consideration only the question of practice as to the time when this *prima facie* presumption can properly be made conclusive. That the one having such a claim may at some time have this *prima facie* presumption made conclusive so evidently results from well-settled rules of practice that it will not be questioned; and if this is true, there would seem to be no good reason why this should not be done at the earliest possible moment, when the necessary parties can be brought before the court for that purpose."

And again :

"It necessarily follows that the plaintiff is entitled to have his judgment show upon its face the fact that it is for a community debt."

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If that be true, then it seems to us that it would equitably follow that the wife would have a right to have the judgment show upon its face the fact that it was not a community debt. The plaintiff, under the rule announced, had a right to make the wife a party and he might have made her a party had he seen fit. Her rights are co-equal with those of the plaintiff. She introduced no new issues by her complaint in intervention, but only asked to have the question determined then that must necessarily be determined before the realization on the judgment. We therefore hold that the demurrer to the complaint was properly overruled.

The other proposition urged by the appellant raises the question whether the community real property is liable for the satisfaction of a judgment rendered upon an accommodation paper of the husband, negotiable in form, in favor of a *bona fide* holder who acquired the paper before maturity without notice of its accommodation character. It is urged by the appellant that in *McDonough v. Craig*, *supra*, and *Bierer v. Blurock*, 9 Wash. 63 (36 Pac. 975), it was held that all business which the husband transacts is presumed to be community business; that all contracts and obligations entered into by the husband are presumed to be contracts and obligations of the community. This is true, but the holding only went to the extent of a presumption, and the case of *McDonough v. Craig* was to the effect that this presumption could be overturned by testimony, and that the fact that the debt contracted was not for the benefit of the community would relieve the community real estate from liability. A lucid and strong argument is made by the appellant in his brief against the policy of this law, but it is an argument which should be

more properly directed to the legislature than to the courts. The uniform holding of this court, from the announcement of the decision in *Brotton v. Langert*, 1 Wash. 73 (23 Pac. 688), has been to the contrary. In the face of the statute we are unable to hold that the note made to evidence a debt which is not for the benefit of the community can be collected out of community real estate. So much has been said on this subject that it hardly seems worth while to enter into a discussion upon the merits of that question now. The court, however, in this case decreed that the debt was a separate debt of defendant and that it could not be satisfied out of the community property. This decision was too comprehensive, for, under the ruling of this court in *Powell v. Pugh*, 13 Wash. 577 (43 Pac. 879), the judgment could be enforced against the community personal property. It is conceded by the respondent that this case falls within the rule announced by the court in the case above cited, but the court is asked to overrule that case. We are, however, satisfied with the ruling made in that case and must hold that it was error in the court to exclude the community personal property from the operations of this judgment.

From the record, however, we can easily determine that no good purpose would be subserved in reversing the case and ordering a new trial, and the case will therefore be remitted with instructions to the lower court to modify its judgment in the manner above indicated, and as so modified it will be affirmed, the appellant to obtain costs of his appeal in this court.

HOYT, C. J., and SCOTT, J., concur.

ANDERS, J., concurs in the result.

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[No. 2217. Decided October 9, 1896.]

**JULIUS HORTON *et ux.*, Respondents, v. THE DONOHUE
KELLY BANKING COMPANY *et al.*, Appellants.**

**APPEAL BOND—SUFFICIENCY OF—COMMUNITY PROPERTY—LIABILITY
FOR SURETYSHIP DEBTS—LEVY ON HUSBAND'S INTEREST FOR COM-
MUNITY DEBT.**

An appeal will not be dismissed for the reason that the affidavit of the surety in the appeal bond fails to state that such surety is worth the required amount over and above all debts and liabilities as required by the statute.

The property of the community is liable for an obligation of suretyship incurred by the husband in behalf of a corporation in which he is an officer and stock holder, in order to protect the property and business of the corporation, when, under all the circumstances of his relations with the corporation, it is to be presumed that he was acting for the community, and that any benefits which might have grown out of his connection with such corporation would have belonged to the community.

Where community property stands in the name of the husband, a levy upon all of his interest in the property, upon a judgment which could be enforced against the community, would authorize a sale of the property standing in his name for the benefit of the community. (Scott, J., dissents).

Appeal from Superior Court, King County.—Hon.
J. W. LANGLEY, Judge. Reversed.

Bausman, Kelleher & Emory, for appellants.

John G. Barnes, for respondent.

The opinion of the court was delivered by

ANDERS, J.—Respondents move to dismiss the appeal for the reason that the affidavit of the surety in the appeal bond does not state that such surety is worth the required amount over and above all debts and liabilities, as required by the statute.

It was held in the case of *McEachern v. Brackett*, 8

15	399
18	347
15	399
15	540
16	199
16	649
15	399
20	15
15	399
22	196
22	304
15	399
24	387
15	399
33	88
15	399
40	466

Wash. 652 (36 Pac. 690), that defects of this kind were not such as would justify the dismissal of the appeal, and such ruling was affirmed in the cases of *Warburton v. Ralph*, 9 Wash. 537 (38 Pac. 140), and *Cook v. Tibbals*, 12 Wash. 207 (40 Pac. 935); and while, in the case of *Northern Counties Investment Trust v. Hender*, 12 Wash. 559 (41 Pac. 913), it was held that an appeal bond to which no affidavit of the surety was attached was insufficient, and that by reason of such insufficiency the appeal should be dismissed, the opinion in that case shows that it was not the intention of the court to in any manner overrule the cases above cited. On the contrary it affirmatively appears therefrom that it was because the majority of the court thought that this case could be distinguished from those that the appeal was dismissed, notwithstanding the fact that such majority was satisfied with what had been theretofore held upon the subject. It follows that this court in four or more cases has announced the rule that defects like the one in the bond under consideration furnish no sufficient reason for the dismissal of an appeal, and such must be taken to be the settled rule of this court, and thereunder the motion to dismiss must be denied.

Stripped of technicalities, the real question presented for our decision upon this appeal is as to whether or not the consideration moving to a corporation of which the husband is an officer and stockholder under such circumstances that his relations as such are in connection with the business of the community, composed of himself and wife, will authorize the enforcement of a liability incurred by him as surety for such corporation against the property of such community. That the benefit to the corporation would furnish a sufficient consideration to the husband, so that the contract could be enforced against

him, is conceded, but it is strenuously contended that the liability thus incurred is not that of the community and cannot be enforced against the community property; and *Spinning v. Allen*, 10 Wash. 570 (39 Pac. 151), is cited to sustain the contention.

In that case the husband was really but a nominal stockholder. The stock had been given to him and was his separate property, and the case should be viewed in that light, although the opinion there rendered fails to state this and it was not published in a statement of facts. In the case at bar a different question is presented. Here the surety had a substantial interest in the corporation, which he held for the benefit of the community. Hence, when he saw fit to incur liability as a surety for its benefit, it will not be presumed that it was from pure friendship to the corporation, but rather for the purpose of protecting his interest therein. Hence the liability incurred was in the course of business, and this business did not relate to his own separate estate but to property rights belonging to the community. If to aid the corporation in which he was thus interested he had performed services and such services had resulted in a benefit to the corporation, such benefit would have inured to the community and not to the husband alone. This being so, the converse must be true, and a liability incurred for the benefit of the corporation should be enforceable against the property of the community.

As said in this court in the case of *Oregon Improvement Co. v. Sagmeister*, 4 Wash. 710 (30 Pac. 1058), it will not do to hold that the community occupies such a relation to the business done by the husband that it is entitled to reap all of the benefits thereof without at

the same time holding that it is subject to all its liabilities. Under the allegations of the answer in the case at bar, to which the superior court sustained a demurrer, it must be presumed that the husband in all his relations with the corporation was acting for the community, and that any benefits which might have grown out of his connection with such corporation would have belonged to the community. It must further be presumed that when he incurred the liability as surety for such corporation he did it as a matter of business to protect the property and business of such corporation. It must follow that in all he did in the matter he bound the community.

It is claimed that even if the community property was liable, the form of the levy made by the sheriff was insufficient, and the case of *Stockand v. Bartlett*, 4 Wash. 730 (31 Pac. 24), is cited to sustain the claim. What was held in that case was that the husband had no such separate interest in the community property that it could be reached upon an execution for a debt which could not be enforced against the community. But no such question is raised by the form of the levy in this case. The property presumably stood in the name of the husband, and a levy upon all of his interest in the property upon a judgment which could be enforced against the community would authorize a sale of the property standing in his name for the benefit of the community. But whether or not this is so, the decree from which the appeal was prosecuted enjoined the enforcement of the judgment against the community property, and, under the law which we have found to govern the case, was unauthorized. It will, therefore, be reversed and the cause remanded with instructions to overrule the demurrer to the answer.

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HOYT, C. J., and DUNBAR, J., concur.

SCOTT, J.—I concur in all that is said except as to the manner of enforcing the judgment.

ON PETITION FOR RE-HEARING.

Per Curiam.—The respondents' petition for rehearing in this case is so discourteous and unprofessional that we deem it unfit for consideration. It will therefore be stricken from the files of the court.

[No. 2410. Decided October 10, 1896.]

THE STATE OF WASHINGTON, *on the Relation of Hiram Dustin, Respondent*, v. CLAUDE RUSK *et al.*, *Appellants*.

15	408
20	843

STATUTES — REPEAL BY IMPLICATION — CONSTITUTIONAL LAW — TITLE OF ACT — LEGISLATIVE CONTROL OF SUPERIOR COURT DISTRICTS.

The act of March 2, 1891, entitled "an act providing for judges and additional judges for the superior court in various counties in the state of Washington," etc., is repealed by implication by the act of March 19, 1895, entitled "an act in relation to superior courts and the election of superior court judges," as the plain intent of the legislature appears in the latter act to be to provide for the election of all the superior court judges of the state by the districts provided for in the act.

The subject matter of an act providing for the election of superior court judges by newly established districts is sufficiently embraced in the title reciting that it is "an act in relation to superior courts and the election of superior court judges."

Construing in the light of the circumstances surrounding the adoption of the constitution and the legislative construction thereof, art. 4, §5, of that instrument, which provides that "There shall be in each of the organized counties of this state a superior court, for which at least one judge must be elected by the qualified voters of the county at the general state election; provided, that until otherwise directed by the legislature" judges shall be elected pursuant

to certain groupings of counties set forth in such section, it must be held that it was thereby intended to vest in the legislature the discretion to determine as to when each of the counties should elect a judge for itself, and how the counties not entitled to so elect should be grouped for judicial purposes.

Appeal from Superior Court, Klickitat County.—
Hon. SOLOMON SMITH, Judge. Reversed.

N. B. Brooks, and *George N. Maddock*, for appellants.

H. Dustin, and *W. B. Presby*, for respondent.

The opinion of the court was delivered by

HOTT, C. J.—To sustain the judgment entered in the superior court, it is necessary to hold that the act of March 19, 1895, (Laws 1895, p. 176) entitled, "An act in relation to superior courts and the election of superior court judges," is unconstitutional, or that, if constitutional, the act of March 2, 1891, (Laws 1891, p. 117) entitled, "An act providing for judges and additional judges for the superior court in various counties in the state of Washington, and declaring an emergency," was not repealed thereby.

As to the latter proposition, it is sufficient to say that the plain intent of the legislature was to provide, not for the election of additional judges in certain counties or districts, but to provide for the election of all of the superior court judges of the state by districts provided for in the act. This being the evident object of the act, it must be held to have repealed the act of 1891, notwithstanding the absence of any repealing clause.

The constitutionality of the act is attacked upon two grounds, (1) that the title does not sufficiently indicate the subject matter contained in the act; and (2) that the act is in contravention of § 5, art. 4 of the

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constitution of the state. As to the first question it is sufficient to say that the title sufficiently refers to superior courts and the election of superior court judges to make it competent for the legislature to enact anything relating to such courts or to the election of such judges. See *Marston v. Humes*, 3 Wash. 267 (28 Pac. 520).

The other question is one of more difficulty. A technical construction of the language used in the constitution might warrant the contention that thereunder the legislature had no jurisdiction as to superior court districts or the judges thereof, except to declare when the grouping contained in the proviso to said section should terminate and the general provision therein contained be given force. But, under a more liberal construction of the language, it may well be held that it was the intention to vest in the legislature full discretion as to when each county should be authorized to elect its own judge, and how counties not entitled to elect their own judges should be grouped for judicial purposes, and the real question presented for decision upon this appeal is as to which of these two constructions shall obtain.

It may be conceded that the first is best warranted by the language used unaffected by the circumstances surrounding the adoption of the constitution and by the legislative construction which has obtained from the adoption of the constitution to the present time. But when examined in the light of such surroundings and such legislative action, we feel warranted in adopting the more liberal construction; first, for the reason that no act of the legislature should be declared unconstitutional unless it is so clearly so as to be beyond reasonable question; second, by reason of the serious consequences which would necessarily re-

sult from the technical construction. If such technical construction were to be adopted, the act of 1891 would, in many of its features, be unconstitutional, yet said act has, in all of its features, been acted upon and superior court judges elected jointly by counties grouped for that purpose, some of which would have had no right to participate in such elections except by force of said act. It must follow that, under the technical construction of the constitutional provision it would be held that the judges so elected were at most but *de facto* officers, and it might require much litigation to determine whether or not they were officers of any kind. The legislature having adopted a liberal construction of the constitutional provision and the legislation enacted in pursuance of such construction having been acquiesced in and acted upon, must have great weight with the court and strongly incline it to that construction if the language used will at all justify it.

Beside, the technical construction would prevent the legislature from taking steps which the highest considerations of public policy and the economical administration of governmental affairs might require. Thereunder the legislature would be powerless to reduce the number of judges in the state by enlarging any group of counties entitled jointly to elect a judge, however much the business therein might decrease and however clear it might be that an election by the larger group would subserve the public interests.

In our opinion, no great violence is done to the language of the section of the constitution under consideration when taken as a whole by holding that thereby it was intended to vest in the legislature the discretion to determine as to when each of the counties should elect a judge for itself, and how the coun-

ties not entitled to so elect should be grouped for judicial purposes.

It follows from what we have said that the county of Klickitat is not entitled to elect a judge for itself at the coming election, but must act jointly with the counties of Skamania, Clarke and Cowlitz in the election of a judge for the district composed of those counties and itself.

The judgment will be reversed and the cause remanded with instructions to the superior court to dismiss the proceeding.

DUNBAR and SCOTT, JJ., concur.

ANDERS, J., dissents.

[No 2290. Decided October 19, 1896.]

THE STATE OF WASHINGTON, *on the Relation of Traders' National Bank of Spokane, Appellant*, v. ARTHUR T. WINTER, *Treasurer, Appellant*.

MUNICIPAL CORPORATIONS — ASSUMPTION OF ILLEGAL INDEBTEDNESS —
POWER OF LEGISLATURE TO AUTHORIZE — DELEGATION OF POWERS.

Indebtedness incurred by a void municipal organization may be assumed as a valid indebtedness by a duly organized municipal corporation subsequently incorporated within the same territory under a statute providing for the re-incorporation of such towns and legalizing contracts and obligations theretofore made or entered into by such void corporations.

It is competent for the legislature to direct the payment by a municipal corporation of a claim that the law does not recognize as a legal obligation, and to ratify any act which it could have authorized to be done.

An ordinance providing for the surrender to, and filing with, the mayor and clerk of a town of certain warrants issued by the town under a void incorporation thereof and directing the issuance of

15	407
16	422
15	407
20	89

new warrants by such officers is not a delegation to them of power belonging to the council, when the ordinance itself shows that the council had audited and allowed such warrants by expressly recognizing the validity of the claims upon which they were issued.

Appeal from Superior Court, Stevens County.—Hon. JESSE ARTHUR, Judge. Reversed.

Graves, Wolf & Graves, for appellant.

S. & J. W. Douglas, and *W. M. Murray*, for respondent.

The opinion of the court was delivered by

GORDON, J.—This was an application in the lower court for a writ of mandate compelling the respondent, as treasurer of the town of Colville, (a municipal corporation of the fourth class,) to pay certain warrants of said municipality held and owned by the relator. An issue of fact having been formed, the case was tried below upon an agreed statement of facts, and from a judgment dismissing the application, the relator has appealed.

From the agreed statement of facts which has been brought to this court it appears that some time in the year 1888 the territory now embraced within and constituting the present town of Colville was incorporated under the corporate name of "The Town of Colville," under and by virtue of an act of the legislature of the territory of Washington approved February 2, 1888. (Laws 1887-8, p. 221). This act was subsequently declared to be unconstitutional. (*Territory v. Stewart*, 1 Wash. 98 (23 Pac. 405). After its attempted incorporation, and prior to the decision in *Territory v. Stewart*, *supra*, said town proceeded to exercise corporate functions, to elect officers and incur indebtedness for street improvements and otherwise, in payment of which in-

debtedness warrants were issued upon its treasury. The statement shows that "the said town became indebted to the Stevens County Bank for various and divers sums of money, being the same sums of money as are expressed upon the face of the warrants herein referred to, and in discharge of said indebtedness the then mayor and the then clerk of said old town duly and regularly in all things as required by law, drew the several warrants of the said town in payment thereof, and the same were delivered to the said Stevens County Bank. . . . That said warrants would have been valid and binding upon said town but for the unconstitutionality of the act under which its then incorporation was had." It further appears from said statement that *after* the act under which the old town attempted to incorporate had been declared unconstitutional, and prior to the 23d of December, 1890, the territory and inhabitants embraced within the town of Colville, as incorporated under the act of February 2, 1888, already referred to, incorporated under an act of the legislature of the state of Washington approved March 27, 1890 (Laws 1889-90, p. 131); that thereafter, on the 6th of January, 1891, the town council of said town as at present organized passed ordinance No. 22, entitled, "An ordinance to provide for the payment of an indebtedness of the town of Colville, Washington, by the redemption of old warrants, and for the issuance of new ones therefor representing said indebtedness." Said ordinance among other things recites:

"That whereas the said town of Colville, Washington, by and through the board of trustees thereof, incurred a large indebtedness for public improvements and other necessary and legitimate purposes, and did issue its municipal warrants or orders in payment

thereof; and whereas the said town of Colville, Washington, is desirous of paying the just indebtedness aforesaid of the said town and *having received and enjoyed the benefits derived from said indebtedness* and as a just and proper municipal indebtedness therefor."

The ordinance then provides for the surrendering and filing with the town clerk of said town of the warrants of the old town for redemption and cancellation, and authorizes the issuing of new warrants by said town as at present incorporated "in all respects as other warrants are now issued by said town council," for the amount or amounts due upon said redeemed and canceled warrants."

Upon the part of the respondent it is contended, (1) that the town of Colville did not have the power to assume and pay indebtedness incurred by the old town organization acting under the unconstitutional law of 1888; (2) that the ordinance authorizing the issuance of warrants of the present town in lieu of the old warrants was and is invalid because it was a delegation to the mayor and town clerk of power residing in the council.

We think that neither of these positions can be maintained. As to the first, § 165 of the act of March 27, 1890, under which the present town is incorporated, as amended by the act of March 7, 1891, (Session Laws of 1891, p. 279), provides that —

"Nothing in this chapter contained shall be construed to prevent any town having a bonded or other indebtedness contracted under laws heretofore passed from levying and collecting such taxes for the payment of such indebtedness; . . . and provided further that any ordinance duly passed by the town council of any town *prior to the passage of this act* authorizing the payment of said indebtedness, shall be and the same is hereby declared valid (and legal and binding)."

The action of the trustees of the old town, in making improvements and incurring the supposed valid indebtedness evidenced by its warrants constituted a moral obligation upon the inhabitants and territory thereafter included within the corporate limits of the present town, and the legislative enactment above referred to was for the purpose of legalizing and validating ordinances of the scope and character of ordinance No. 22, *supra*. It is not contended that it was not competent for the legislature to pass such validating enactment, but if any doubt could exist as to the effect of the passage of the ordinance and the mandatory act of 1891, *supra*, that doubt, we think, is removed by the further act of March 9, 1893, (Session Laws of 1893, p. 183), which provides that —

“The incorporation of all cities and towns in this state heretofore had or attempted under sections one, two and three of an act entitled, ‘An Act providing for the organization, classification, incorporation and government of municipal corporations, and declaring an emergency,’ [being the act under which the present town is incorporated,] . . . is hereby for all purposes declared legal and valid . . . And all *contracts and obligations* heretofore made, entered into or incurred, by any such city or town so incorporated or *re-incorporated* are hereby declared legal and valid and of full force and effect.”

It is competent for the legislature to direct the payment, by a municipal corporation, of a claim that the law does not recognize as a *legal* obligation, and to ratify any act which it could have authorized to be done. 1 Dillon, *Municipal Corporations*, (4th ed.), § 75; *New Orleans v. Clark*, 95 U. S. 644; *Mayor v. Tenth National Bank*, 111 N. Y. 446 (18 N. E. 618);

Mayor of Guthrie v. Territory, 1 Okl. 188 (31 Pac. 190);
Baker v. Seattle, 2 Wash. 576 (27 Pac. 462).

Indeed this question can scarcely be considered an open one in this state, since the decision in *Abernethy v. Town of Medical Lake*, 9 Wash. 112 (37 Pac. 306), a case which presented almost the identical questions which we are here considering.

As to the second objection urged by the respondent, viz., that the ordinance is invalid because attempting to delegate power belonging to the council, we think that the ordinance itself contains sufficient evidence of the fact that the warrants in question were audited by the council, and expressly recognizes the validity of the claims upon which the warrants in question were issued. Such recognition and authority to its ministerial officers to issue the warrants is all that is required to constitute the auditing and allowance of a claim on the part of the council.

Upon the pleadings in the case and the agreed statement of facts, we think that judgment should have been for the relator, and the cause will be remanded for further proceedings in accordance with this opinion.

HOYT, C. J., and ANDERS, DUNBAR and SCOTT, JJ.,
concur.

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Opinion Per Curiam.

[No. 2350. Decided October 21, 1896.]

THE STATE OF WASHINGTON, *Respondent*, v. C. O.
DOWNING, *Appellant*.

EMBEZZLEMENT BY PUBLIC OFFICER—INFORMATION—INSTRUCTIONS.

An information charging one as having received by virtue of his office as county clerk a sum of money belonging to the county, which he unlawfully, knowingly, fraudulently and feloniously took and converted to his own use and embezzled, is sufficient to charge a crime under the provisions of § 57, Penal Code.

Where a prosecution of a public officer for the embezzlement of public funds is had under Penal Code, § 57, making the offense a felony, an instruction to the jury based on that theory is not erroneous, although another statute may provide for the punishment of such acts as misdemeanors.

Appeal from Superior Court, Spokane County.—
Hon. NORMAN BUCK, Judge. Affirmed.

Griffitts & Nuzum, and *Henley & Kellam*, for appellant.

J. W. Feighan, Prosecuting Attorney, for The State.

Per Curiam.—The information upon which appellant was convicted in the superior court is as follows:

“That on, to-wit: the 19th day of December, A. D. 1894, the said C. O. Downing was the duly elected, qualified and acting county clerk in and for the county of Spokane and state of Washington, and the ex-officio clerk of the superior court in and for said county and state, and, as such county clerk and ex-officio clerk of the superior court was not allowed by law to be paid or to receive any money, fees or compensation for his services as such county clerk and ex-officio clerk of the superior court, except the salary provided and allowed to be paid him by law as such county clerk and ex-officio clerk of the superior court.

“That, as such county clerk it became and was the

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18	645
15	413
31	114

duty, imposed by law, to receive certain moneys, fees and deposits, by virtue of the said office; and, that on said 19th day of December, A. D. 1894, at the county of Spokane and state of Washington, the said C. O. Downing, then and there being, did receive and there was paid to him as such county clerk and ex-officio clerk of the superior court, and by virtue of said office, the sum of seventy-two and 35-100 dollars (\$72.35), lawful money of the United States of the value of seventy-two and 35-100 dollars (\$72.35). Which said prosecuting attorney is unable more particularly to describe. The same being money, fees, charges, fines and deposits in the case of *The State of Washington v. C. E. Bartholomew*. Which said money, fees, charges, fines and deposits were paid to him, the said C. O. Downing, as county county clerk and ex-officio clerk of the superior court, and should have been paid and delivered to the treasurer of Spokane county by him, the said C. O. Downing, on the first Monday of January, 1895, according to law.

"That said C. O. Downing, as such county clerk and ex-officio clerk of the superior court, having received the said sum of seventy-two and 35-100 dollars (\$72.35) as aforesaid, at and in said county and state as aforesaid, then and there being, did then and there, on the said 19th day of December, 1894, aforesaid, unlawfully, wilfully, knowingly, fraudulently and feloniously fail and refuse, and still fails and refuses to pay the said sum or any portion thereof to the county treasurer as required by law, but unlawfully, wilfully, knowingly, fraudulently and feloniously did take, convert to his own use and embezzle the said sum of seventy-two and 35-100 dollars (\$72.35), received by him as aforesaid.

"That said sum embezzled as aforesaid was the money and property of the county of Spokane and state of Washington."

1. It is urged as ground for reversal that the court erred in overruling appellant's demurrer. Counsel for the appellant, in a very able and exhaustive brief,

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Opinion Per Curiam.

urge that the information is insufficient to charge an offense under § 2 of the act of March 9, 1893 (Session Laws, p. 184), making it embezzlement for any county officer to whom a salary is paid to fail to pay to the county treasury all sums which shall come into his hands for *fees and charges in his office*. Also, that it does not charge an offense under § 57 of the Penal Code (vol. 2, Hill's Code), which is as follows :

"§ 57. If any state, county, township, city, town, village, or other officer elected or appointed under the constitution or laws of this state, court commissioner, or any officer of any court, or any clerk, agent, servant or employee of any such officer, shall, in any manner not authorized by law, use any portion of the money intrusted to him for safe-keeping, in order to make a profit out of the same, or shall use the same for any purpose not authorized by law, he shall be deemed guilty of a felony, and on conviction thereof shall be imprisoned in the penitentiary not less than one nor more than ten years."

Singularly enough, counsel for the appellant as well as for the state have overlooked the decision of this court in *State v. Isensee*, 12 Wash. 254 (40 Pac. 985), which we think is directly in point. The defendant in that case was city treasurer of the city of Whatcom, and the information charged him with receiving into his possession, custody and control by virtue of his office sixty thousand dollars of the money and property of said city, which money he "unlawfully, fraudulently and feloniously did misapply, embezzle, appropriate and convert to his own use." This court held that the information in that case was sufficient under § 57, *supra*, and being satisfied with the conclusion there reached, it follows upon the authority of that case that no error was committed in overruling the demurrer herein. And for the same reason it was

not error for the court to give instruction number three.

Exception was taken to the giving of the following instruction to the jury :

“The court instructs you that all fines imposed upon any person by the provisions of the laws of this state, where the same shall be collected, shall be paid to the county treasurer of the county; and if the jury find that the defendant in this case received by virtue of his office the sum of \$72.35 as charged in the information, as a fine and costs, and that the defendant failed to pay said sum over to the county treasurer, but retained the same with the intention to convert it to his own use, and did convert the same to his own use, the jury will find the defendant guilty as charged in the information.”

Section 1335, Code Proc. (vol. 2, Hill's Code), provides that —

“All fines imposed on any person by the provisions of this code, where the same shall be collected, shall be paid to the county treasurer of the county where such conviction shall have been had, to go into the general county fund. The county treasurer shall give duplicate receipts therefor, one of which shall be filed with the county auditor; and all officers refusing or neglecting to pay over any fines within one month after they shall have been received shall, upon conviction thereof, be fined in fourfold the amount of such fines so received;”

and it is insisted that the instruction complained of is erroneous for the reason that the penalty provided for a failure or neglect to pay over to the county treasury any fines under § 1335 is punishable as a misdemeanor only and not as a felony, but we repeat that the prosecution in this case is under § 57 and that the defendant is charged with something more than a mere failure to pay over moneys to the county

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treasurer within a month after their receipt. He is charged here with using them in a manner and for a purpose not authorized by law, namely, with "unlawfully, wilfully, knowingly, fraudulently and feloniously converting the same to his own use." No error appearing of record, the judgment and sentence will be affirmed.

[No. 2398. Decided October 23, 1896.]

In the Matter of the Application for the Disbarment of John B. Ault: INTERSTATE SAVINGS AND LOAN ASSOCIATION, *Appellant*.

DISBARMENT PROCEEDINGS — APPEAL BY PETITIONER — INTEREST OF APPELLANT.

Where judgment of dismissal of a petition for the disbarment of an attorney has been rendered, the petitioner has no such interest in the subject matter of the proceeding as will entitle him to prosecute an appeal therefrom.

Appeal from Superior Court, Snohomish County.
—Hon. JOHN C. DENNEY, Judge. Appeal dismissed.

Shank & Smith, for appellant.

Coleman & Hart, for respondent.

The opinion of the court was delivered by

DUNBAR, J.—An application was filed in the superior court of Snohomish county by the Inter-State Savings and Loan Association, alleging many delinquencies on the part of the respondent John B. Ault, and praying the court for an order citing said John B. Ault to appear and show cause, if any he had, why he should not be forthwith disbarred and his name

stricken from the roll of attorneys of said court. Respondent demurred to the petition upon the ground: (1) that the court had no jurisdiction of the person of the respondent in this proceeding, (2) that it had no jurisdiction of the subject-matter of the proceeding, (3) that the petition did not state facts sufficient to constitute a cause of action, and (4) that the proceeding was not being prosecuted upon the court's own motion.

This demurrer was sustained by the court and judgment of dismissal entered, from which judgment an appeal is taken to this court. The respondent now moves the court to dismiss this appeal for the reason that this court has no jurisdiction of an appeal from the order from which this appeal is taken, that the notice of appeal was not served or filed within the time limited by law, and that the appellant has no appealable interest in the subject-matter of this appeal and is not entitled to prosecute it. Without noticing the first two alleged grounds for dismissal, we think the last one, namely, that the appellant has no appealable interest in the subject-matter of this appeal, must be sustained. The record does not disclose the ground upon which the court sustained the demurrer. It was indicated by the appellant in oral argument that it was because the lower court did not think it had jurisdiction to try the cause, and it is insisted that if the appeal is dismissed, the effect would be to assume the very thing in controversy. However that may be, an appeal is a statutory right and if not given by the statute cannot be entertained by this court. The statute provides that a party who is aggrieved may prosecute appeals. We cannot understand how the appellant in this action is in any sense aggrieved. It is not a sentimental grievance that the

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Syllabus.

statute contemplates, but it is a grievance that amounts to an interest. There can be but two parties in interest in a case of this kind outside of the respondent, namely, the court and the public. The respondent is an officer of the court, and the law provides a method by which the court can determine the fitness or unfitness of an attorney for that position, and no doubt the interests of the public can be protected by an action authorized by some one who represents the public, but the appellant in this case neither represents the court nor the public, and it can be of no interest to it who the attorneys of the courts of the state of Washington are. If the judgment of the court had been against the attorney, of course he could appeal, for he would certainly be a party in interest, the judgment depriving him of the right to practice his profession, but we are unable to discover any interest which the appellant in this case has in the matter in controversy.

The motion to dismiss will therefore be granted.

HOYT, C. J., and ANDERS, SCOTT and GORDON, JJ., concur.

[No. 2387. Decided October 27, 1896.]

OLIVER W. REDFORD, *Respondent*, v. SPOKANE STREET RAILWAY COMPANY, *Appellant*.

JURORS — QUALIFICATIONS — CONSTITUTIONAL LAW — UNIFORM LAWS — NEGLIGENCE — PROXIMATE CAUSE — CONTRIBUTORY NEGLIGENCE — STENOGRAPHER'S NOTES AS EVIDENCE.

The act of March 19, 1895 (Laws 1895, p. 139), requiring persons impaneled as jurors to be householders, but making no such requirement of those summoned upon an open venire to complete the panel,

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15	447
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19	59
15	419
21	198
21	223
15	419
23	337
15	419
24	81
15	419
28	351
15	419
30	405
30	555
31	198
15	419
35	344
15	419
41	262

is not unconstitutional as a violation of art. 1, § 12, of the constitution, which provides that "no law shall be passed granting to any citizen, class of citizens . . . privileges or immunities which, upon the same terms, shall not equally belong to all citizens."

Where a law is uniform in its operations, in so far as it operates at all, its constitutionality is not affected by the number of persons within the scope of its operation.

The fact that a person in a vehicle, after having driven across a street railway track, stops his vehicle so close to the track, for the purpose of conversing with a friend, that a car cannot pass without colliding, does not necessarily constitute contributory negligence of such a character as to prevent recovery for the negligence of the railway company in causing a collision.

When the defendant's negligence is the proximate cause of the injury, while that of the plaintiff is only a remote cause or a mere condition of it, the action will lie.

A transcript of the stenographer's notes showing the testimony of a witness on a former trial, is not competent evidence for impeaching the witness's testimony in a subsequent trial of the same cause.

Appeal from Superior Court, Spokane County.—
Hon. JESSE ARTHUR, Judge. Affirmed.

Griffitts & Nuzum, for appellant.

Forster & Wakefield, and *Everett C. Ellis*, for respondent.

The opinion of the court was delivered by

GORDON, J.—This action was brought to recover damages for injuries resulting from a collision between a car operated by the appellant and a vehicle owned and occupied by the respondent. The cause was before this court upon a former appeal and is reported in 9 Wash. 55 (36 Pac. 1085). Upon such appeal this court reversed a judgment entered upon the verdict of the jury in favor of the plaintiff therein (respondent here), and awarded a new trial which resulted in another verdict favorable to the respondent, and from

the judgment entered thereupon in his favor the cause is again before it.

As a first ground of error relied upon for a reversal, the appellant complains of an order of the lower court denying its motion to set aside the panel and venire, from which the trial jury was drawn. In support of this claim appellant insists that the act of March 19, 1895, (Session Laws 1895, p. 139), is unconstitutional, for the reason that it discriminates "against citizens as jurors, if they are not householders. It makes it necessary to be a householder when no such requirement is made of jurors summoned on an open venire;" and that "it is unequal and discriminates against certain classes of citizens and requires qualification for duty inconsistent with the constitution of the state." The particular sections of the constitution relied upon are §§ 12, 21 and 22, of art. 1. We are unable to perceive (and the brief of counsel in no way makes it clear) what bearing §§ 21 and 22, *supra*, have upon the question. Sec. 12, however, provides:

"No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations."

The learned counsel for the appellant cites no authority in support of his contention that the act in question is obnoxious to this provision. On the other hand, we think that the act is constitutional and must be sustained upon the authority of *McAunich v. Mississippi, etc., R. R. Co.*, 20 Iowa, 338; *State v. Mining Co.*, 16 Nev. 432; *Cordova v. State*, 6 Tex. App. 207. That the act requires that jurors shall be householders—a qualification not required by the old law—furnishes no sufficient reason in our judgment for

holding that it is unconstitutional, nor is the question affected by the further fact that that qualification is not a requisite of jurors summoned upon an open venire. The act of 1895 is uniform in its operations in so far as it operates at all, and its constitutionality is not affected by the number of persons within the scope of its operation.

2. The court, at the instance of the appellant submitted to the jury two special requests for findings, as follows:

"1st. After the plaintiff stopped his horse and buggy at the place of the accident, and before or just at the time of the collision, was the buggy backed or moved closer to the street car track than where it was when the plaintiff first stopped? No.

"2nd. When the plaintiff stopped his horse and buggy on Bridge street at the point of the accident, was the buggy far enough from the railroad track so that a car could pass in safety if the buggy had remained stationary at the exact place it was when plaintiff first stopped? No."

It is insisted that these special findings are inconsistent with the general verdict, and that they are sufficient to show that respondent was guilty of contributory negligence which would defeat a recovery, and that appellant is entitled to judgment notwithstanding the general verdict. In connection therewith we may also consider the failure of the court to instruct the jury in accordance with appellant's request No. 20, which is as follows:

"If plaintiff while riding along the street described in this case as Bridge street stopped in the street it was his duty in law to stop in such a position as to allow the defendant's car to pass without striking his vehicle and to look and see that such was his position, and if he failed to do so, such failure would of itself constitute such contributory negligence as would de-

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feat a recovery in this case and your verdict should be for the defendant."

The refusal of the court to give this instruction is assigned as error. Considering these assignments together the theory of appellant is fully disclosed and we do not think it can be maintained.

It appears from the evidence that plaintiff had driven across appellant's track, and after crossing, stopped to converse with a friend, and that while so engaged the collision occurred, and the claim of appellant is that if the respondent stopped his vehicle in such close proximity to appellant's track as not to enable its car to pass without colliding with the vehicle, he was guilty of contributory negligence and cannot recover. We agree with counsel for respondent that plaintiff's nearness to the track was a "condition" of the injury and not the cause of it, and we think that the jury were fully and fairly instructed that plaintiff could not recover unless the defendant's negligence was the proximate cause.

"When the defendant's negligence is the proximate cause of the injury, while that of the plaintiff is only a remote cause or a mere condition of it, the action will lie." Beach, *Contributory Negligence* (2d ed.), § 54; *Gothard v. Alabama, etc., R. R. Co.*, 67 Ala. 114; *Lay v. Richmand, etc., R. R. Co.*, 106 N. C. 404 (11 S. E. 412); *Newcomb v. Boston Protective Department*, 146 Mass. 596 (16 N. E. 555, 4 Am. St. Rep. 354); *Norris v. Litchfield*, 35 N. H. 271 (69 Am. Dec. 546); *Davies v. Mann*, 10 Mees. & W. 546.

The court in substance instructed the jury that the rights of the parties to the use of the street were mutual, and that in operating its cars along the street the company was required to exercise ordinary care and prudence to avoid injury to others; that persons travel-

ing the street were also held to the same degree of care to avoid injury to themselves, and that such persons when upon streets on which cars are run should "look and listen and be otherwise watchful." The charge as a whole was as favorable to appellant as it had the right to demand, and we think that no reversible error can be predicated upon the charge.

3. For the purpose of contradicting the respondent the appellant offered in evidence what purported to be a certified copy of the transcript containing respondent's testimony given upon the former trial. It was excluded upon respondent's objection and this ruling is assigned as error. The proper method of impeachment would have been to produce the stenographer or some one else who had heard the testimony given by the respondent on the former trial, but a transcript of the stenographer's notes was not competent evidence, and the objection was properly sustained. 1 Thompson, Trials, § 504; *Phares v. Barber*, 61 Ill. 271; *State v. Hayden*, 45 Iowa, 11; *State v. Adams*, 78 Iowa, 292 (43 N. W. 194).

The other rulings complained of have been examined, and no error calling for a reversal being found, the judgment appealed from is affirmed.

ANDERS and DUNBAR, JJ., concur.

Oct. 1896.]

Opinion Per Curiam.

[No. 2335. Decided October 29, 1896.]

THE STATE OF WASHINGTON, *Respondent*, v. LEE HOW-
ARD *et al.*, *Appellants*.

APPEAL — BILL OF EXCEPTIONS — SETTLEMENT OF — AFFIDAVITS — HOW
INCORPORATED IN RECORD.

A bill of exceptions will be stricken from the transcript on appeal, upon motion therefor, when no notice of its statement or settlement had been given to the adverse party as required by Laws 1893, p. 114, § 9.

Where a motion and affidavit for continuance, improper statements of the prosecuting attorney to the jury, and papers used upon a motion for a new trial have not been made a part of the record in the cause by proper bill of exceptions or statement of facts, they will be stricken from the transcript, as the act of filing them with the clerk of the superior court does not raise the presumption that the attention of the lower court had thereby been directed to them.

Appeal from Superior Court, Douglas County.—
Hon. WALLACE MOUNT, Judge. Affirmed.

W. J. Canton, for appellants.

M. B. Malloy, Prosecuting Attorney, for The State.

Per Curiam.—The appellants have appealed from the judgment and sentence of the superior court of Douglas county entered upon a verdict of the jury finding them guilty of the crime of horse-stealing. Counsel for the state have moved the court to strike from the transcript what purports to be a bill of exceptions, for the reason that no notice of the statement of the same was ever given or served as required by law. The motion must be granted.

Section 9, of the act of March 8, 1893, (Session Laws, p. 114), requires a party desiring to have a bill of exceptions or statement of facts certified to prepare the same as proposed by him, file it in the cause and

15	425
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serve a copy thereof upon the adverse party, and to give such opposite party not less than three nor more than ten days' notice of the time when and where he will apply to the trial judge to have such bill of exceptions or statement of facts settled and certified. No notice of any kind or character appears to have been given in this case. It follows that the purported bill or statement must be stricken.

A further motion is made to strike from the transcript what purports to be copies of the motion and affidavit for continuance, also certain purported statements of the prosecuting attorney to the jury, and certain papers purporting to have been used upon a motion for a new trial, for the reason that they have not been preserved or made part of the record in the cause by any bill of exceptions or statement of facts, and this motion must also be granted.

Such papers, unless authenticated by the certificate of the trial judge and brought into the record upon proper bill of exceptions or statement of facts settled upon notice, cannot be considered, because in no other way can it be determined that they formed any part of the proceedings below, or that the attention of the trial court was ever directed to them. *Clay v. Selah Valley Irrigation Co.*, 14 Wash. 543 (45 Pac. 141.) It is not enough that such papers had been filed by counsel with the clerk of the superior court. It does not follow from such findings that the court's attention had been directed to them. The act of filing is *ex parte* and all such papers (other than the technical record or judgment roll) upon which reliance is had in this court, or to which the attention of this court is to be directed upon appeal, should be brought into the record by an appropriate bill of exceptions or statement of facts.

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We have examined the information and think that it sufficiently charges the crime. It follows that the judgment and sentence must be affirmed.

[No. 2248. Decided November 5, 1896.]

W. H. PLUMMER, *Appellant*, v. R. WEIL, *Respondent*.

MOTION FOR DEFAULT — BILL OF PARTICULARS — AMENDMENT — PLEADING — DISMISSAL OF ACTION.

Where a motion for default for failure to plead within the time ordered by the court has been denied, it must be presumed on appeal that sufficient was shown to justify the exercise of the court's discretion in that regard.

The filing by defendant of a motion for a bill of particulars is sufficient, *ipso facto*, to extend the time for answering.

When a bill of particulars furnished by plaintiff pursuant to an order of the court is insufficient, the court has authority to order him to file a further and amended bill of particulars.

In an action by an attorney to recover the value of professional services he may be required to particularize the services and the value of each item, and his failure to keep an account thereof cannot be set up as an excuse for not complying.

Under Code Proc., § 409, authorizing the dismissal of an action by the court, for disobedience of the plaintiff to an order concerning the proceedings in an action, the court is warranted in dismissing an action upon the failure of the plaintiff to comply with an order directing an amended bill of particulars to be furnished.

Appeal from Superior Court, Spokane County.—
Hon. NORMAN BUCK, Judge. Affirmed.

W. J. Thayer, for appellant.

Graves, Wolf & Graves, for respondent.

The opinion of the court was delivered by

GORDON, J.—This action was brought to recover

for professional services alleged to have been performed by the law firm of Plummer and Thayer, at the instance of the defendant (respondent) during the years 1892, 1893 and 1894. The complaint alleges that the services were reasonably worth the sum of one thousand dollars, and that the sum due therefor was, prior to the commencement of this action, assigned by said firm to the plaintiff (appellant herein). The record shows that a so-called bill of particulars had been furnished defendant's counsel upon demand, and that, not being satisfied therewith, they moved the court for an order directing the plaintiff to furnish an amended bill. This motion was allowed and the order granting it directed that the defendant should plead "within five days after the service of said bill of particulars." It appears that the clause fixing the time within which defendant was required to plead was inserted by plaintiff and there is some disagreement between counsel as to whether the attorneys for defendant had any knowledge of the insertion of this clause, but we deem that question wholly immaterial in view of the subsequent action of the court. On the same day, namely, January 18, 1896, an amended bill was furnished, and thereafter on January 24th, the plaintiff filed his motion for default supported by affidavit showing the service of his amended bill on January 18th, and that the defendant had failed to plead thereto within five days as directed by the order of January 18th. On the same day that default was claimed, the defendant moved the court for an order requiring plaintiff to furnish a more particular statement and bill of particulars, and thereupon the court denied plaintiff's motion for a default, and granted defendant's motion for a further and amended bill, and plaintiff having refused to

furnish the same and elected to stand upon the record, a judgment of dismissal was entered, from which this appeal was taken. The appellant assigns as error: (1) the order of the court denying his motion for default, (2) the order of the court requiring plaintiff to further amend his bill of particulars, (3) the order dismissing plaintiff's action.

1. As already observed, a difference exists between the parties as to whether counsel for the defendant had any knowledge of the order of January 18th which required defendant to plead within five days after the service of the amended bill of particulars upon him. But the lower court denied appellant's motion for default, and it must be presumed that sufficient was shown to justify the exercise of its discretion in that regard. *Mason v. McLean*, 6 Wash. 35 (32 Pac. 1006).

Appellant further contends that the filing of a motion for a bill of particulars does not *ipso facto* extend the time for answering. We think the authorities do not sustain this contention. (3 Enc. Pl. & Pr., p. 548.) Besides in this case the order did fix the time in which defendant was permitted to plead and operated as a stay.

2. That the court has authority to order a further and amended bill of particulars, where the one already furnished is insufficient, is a proposition which cannot well be doubted. *Isham v. Parker*, 3 Wash. 755 (29 Pac. 835).

In the bill of particulars furnished plaintiff says that no account was kept of the transactions with defendant, and further that "it is impossible for him to comply with the order of the court any better than he has already done or to make said bill of particulars any more specific on the points directed in the order

of the court." Plaintiff has sued to recover the value of professional services, but when asked to particularize the services, he replies that he kept no books, and is unable to do so except as to particular items of service, the dates of which he does not undertake to give,—other than to state that they were performed during the years 1892, 1893 and 1894,—and the value of which items of service he refuses to specify. We think the bill of particulars furnished was insufficient, and its insufficiency cannot be excused upon the ground that plaintiff kept no books and cannot specify the services or state their value. He assumed the burden of so doing when he brought his action in the present form.

"The burden of proof is on him to show in what the services consisted and their value . . . The failure to keep an account of these services is the fault of the plaintiff, and he must suffer for it, if any one." *Hughes v. Dundee Mortgage and Trust Investment Co.*, 21 Fed. 169.

It is probably true that under the circumstances stated plaintiff might maintain an action to recover an annual retainer (*Hughes v. Dundee Mortgage and Trust Investment Co.*, *supra*), but the complaint in the present case lacks the necessary allegations to entitle plaintiff to such recovery.

3. Sec. 409, Code Proc. (vol. 2, Hill's Code), provides that—

"An action may be dismissed or a judgment of non-suit entered . . . by the court, for disobedience of the plaintiff to an order concerning the proceedings in the action,"

and the court acted rightly in dismissing the action upon failure of the plaintiff to comply with the order

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directing an amended bill of particulars to be furnished.

We regret that we feel compelled to notice another feature of the case. The brief of counsel for the respondent refers to the appellant in language that is grossly improper and unseemly. The intimation is that plaintiff is guilty of attempting "to mislead and circumvent the court and honest attorneys by chicanery and fraud." We find nothing in the record tending in the slightest degree to support the insinuation, or which furnishes any justification for this rude assault upon an honorable and upright member of the bar in whose professional integrity this court has full and entire confidence. To say that it constitutes a grave breach of professional courtesy is to characterize it mildly.

"Where the character of the parties or the attorneys is not involved in the case, all references and comments of a personal nature, by a party in his briefs, are entirely out of place, and are in the nature of an admission that there is not sufficient merit in his side of the controversy to warrant him in relying thereon, and hence that it is necessary to direct attention to the faults or failings of the adverse party or his attorney. It is not complimentary to a court to suppose that such statements would divert its attention from the points at issue, or be given the slightest weight." *Flannagan v. Elton*, 34 Neb. 355 (51 N. W. 967).

We will add that an impropriety so flagrant will in future be regarded as sufficient to require that any brief containing such objectionable matter shall be stricken from the files.

The judgment will be affirmed, but respondent will not recover costs for the printing of his brief.

HOYT, C. J., and ANDERS and DUNBAR, JJ., concur.

[No. 2278. Decided November 5, 1896.]

THE STATE OF WASHINGTON, *on the Relation of Charles H. Wolf*, v. JAMES Z. MOORE, *Judge of the Superior Court of Spokane County.*

MANDAMUS — ALTERNATIVE WRIT — RECITAL OF FACTS.

In an application for a writ of mandate, it is necessary, under Laws 1895, p. 117, § 16 *et seq.*, that the facts relied upon as ground of relief should be set out either in the alternative writ or in a petition served therewith and referred to therein.

Original Application for Mandamus.

Graves, Wolf & Graves, for relator.

W. S. Dawson, and Forster & Wakefield, for respondent.

Per Curiam.—The alternative writ issued in this cause contained no recital of the facts set out in the petition upon which it was issued. Nor was there any reference therein to such petition, or direction that a copy thereof should be served with the writ. Respondent has interposed a demurrer which must be sustained. Whatever may have been the rule adopted by this court before the act of 1895 (Laws 1895, p. 117, § 16 *et seq.*), under said act, it is clearly necessary that the facts relied upon as ground of relief should be set out either in the alternative writ or in a petition served therewith, and referred to therein.

The demurrer will be sustained with leave to file an amended writ.

[No 2360. Decided November 5, 1896.]

THE CORNELL UNIVERSITY, *Appellant*, v. THE DENNY
HOTEL COMPANY, *Appellant*, FABIAN S. POTVIN, *Re-*
spondent.

FABIAN S. POTVIN, *Respondent*, v. THE DENNY HOTEL
COMPANY *et al.*, *Appellants*.

APPEARANCE — WHAT CONSTITUTES — WAIVER OF DEFAULT — APPEAL —
SERVICE OF NOTICE — SUFFICIENCY OF — PARTIES.

The acceptance of service of a summons and complaint by an attorney for defendant and the endorsement thereon of appearance in the cause constitutes an appearance within the meaning of Code 1881, § 72, which provides that "a defendant appears in an action when he answers, demurs, or gives the plaintiff written notice of his appearance, or when an attorney gives notice of an appearance for him."

The entry of a default against a defendant is waived by allowing him to participate in the subsequent proceedings in the cause, to serve and be served with motions, and by otherwise treating him as a party thereto.

Notice of appeal must be served on all parties who have appeared in the action, even though such appearance may not have been made until after the entry of a default against them.

Under Laws 1893, p. 121, § 5, where actual service of notice of appeal cannot be had upon a party or his attorney, the return of the sheriff to that effect is the only competent evidence of the fact sufficient to justify service upon the clerk in behalf of the party not found.

The fact that notice of appeal is served upon an attorney for a certain defendant will not charge him with notice on behalf of another defendant for whom he also appears as attorney.

The fact that an appeal involves two separate cases which had been consolidated pursuant to § 1674, Gen. Stat., will not warrant the supreme court in entertaining jurisdiction of the appeal from a single decree entered therein, when some of the defendants have not been served with notice of appeal, although there may be a proper service upon all the defendants in one of the cases as originally instituted.

Appeal from Superior Court, King County.—Hon. J. W. LANGLEY, Judge. Appeal dismissed.

Cole, Heaton & Dawes, (S. D. Halliday, of counsel), for appellants.

Stratton, Lewis & Gilman, James J. Easley, George E. DeSteiguer, and Wiley & Bostwick, for respondents.

The opinion of the court was delivered by

GORDON, J.—A motion has been made on the part of certain respondents in this cause to dismiss the appeal upon several grounds hereinafter noticed. It appears from the record that a building known as "The Denny Hotel," was constructed in the city of Seattle under contract between the Denny Hotel Company, as owner, and Fabian S. Potvin, contractor. Subsequent to the commencement of the work, the Cornell University, one of the appellants herein, made a loan of \$100,000 to the hotel company, taking as security therefor a mortgage on the premises whereon the hotel was constructed. A notice of lien was filed on the part of contractor Potvin, and various other lien notices were also filed by sub-contractors and material-men, among whom were Peter Stark, John Leck, and the Western Mill Company. The parties last mentioned reduced their claims and liens upon the property to judgment, and subsequent thereto the appellant, Cornell University, commenced an action in the superior court for the foreclosure of its mortgage, making the contractor Potvin and all of the sub-contractors and material-men, including those whose claims and liens had been reduced to judgment, parties defendant in said foreclosure suit. About the same time Potvin commenced an action in the same court for the foreclosure of his lien, making the university

company and hotel company parties defendant therein. These two actions were consolidated and tried together, the principal point in dispute being as to the priority of the lien claims and the mortgage of the university. Service of the summons and complaint in the action commenced by the Cornell University Company, plaintiff, was had upon Peter Stark, defendant therein, and an indorsement of service together with what purports to be an appearance of the defendant in the action is attached to the summons, and is in the following language:

"We hereby admit due personal service upon us of a copy of the summons and amended complaint in the above entitled action, *and enter our general appearance as defendants herein.* Dated at Seattle this 15th day of March, 1892. Lewis & Humphrey, Attorneys for Peter Stark."

Defendant John Leck was personally served with summons. The defendant, the Western Mill Company, through its attorneys, Lyon & Denny, filed a written notice of appearance in said action. Default was entered against defendant Leck on May 14, 1892, and the default of defendant Stark on July 14, 1892. Subsequently, the consolidated case was sent to a referee who made findings of fact and conclusions giving the lien of the Cornell University mortgage a preference over the liens of the various other claimants. To the findings and conclusions of the referee, Peter Stark, John Leck and the Western Mill Company, by their respective attorneys, excepted, and thereafter the University company gave the attorneys for each of said parties notice of its motion to confirm the report of said referee, and upon said last mentioned motion coming on for hearing each of said parties appeared and participated (in connection with the various other

parties to the cause) in the proceedings. The court set aside the report of the referee and entered findings and conclusions of its own, upon which judgment and decree was entered giving the various liens of Stark, Leck, the Western Mill Company, and other claimants, priority and preference over the lien of the mortgage held by the Cornell University. From this decree the Cornell University, the Hotel Company and Dexter Horton & Company have appealed.

The motion to dismiss is urged upon the ground that no service of the notice of appeal was made upon respondents Peter Stark, John Leck and the Western Mill Company. In opposition to the motion it is urged by the appellants that neither Stark nor Leck was entitled to notice of appeal; that they had not appeared in the action, and their defaults had been entered; and that as to the Western Mill Company substituted service of the notice of appeal, as provided by statute, was had. It is strenuously insisted that the acceptance of service of the summons and complaint and the so-called notice of appearance endorsed upon and attached thereto, does constitute an *appearance* within the meaning of § 72 of the Code of 1881, then in force. That section is as follows:

“A defendant *appears* in an action when he answers, demurs, or gives the plaintiff written notice of his *appearance*, or when an attorney gives notice of appearance for him.”

On the contrary, we think that it fully complies with the letter and spirit of the statute and was an appearance. From what has already been stated it appears that respondent Stark actually participated in the proceedings, served exceptions and in turn was served with motions, by appellants' counsel, of subsequent proceedings, all of which was sufficient to con-

stitute not only an appearance in the action, but a waiver of the default which had theretofore been entered. *Hill v. Supervisor*, 10 Ohio St. 621; *Jones v. Jones*, 13 Iowa, 276.

And for like reasons the default of respondent Leck upon whom the summons had been personally served must be deemed vacated by the subsequent action of the parties.

As already noticed the attorneys for the Western Mill Company had given written notice of appearance in the action, and the appellants do not object to the sufficiency of its appearance. The notice of appeal is also directed to it as well as to respondents Stark, Leck and various other respondents. This notice of appeal was not served upon the mill company, but substituted service is relied upon.

Section 5 of the act of March 8, 1893 (Session Laws, p. 121), governing appeals, provides that,—

“Where the record and files in the cause do not disclose the address of a party on whom service should be made, or of his attorney, and neither such party nor his attorney can be found within the county in which the judgment or order appealed from was rendered or made (*of which fact a return by the sheriff that they cannot be so found shall be proof*), the notice of appeal need not be served on such party, but the appeal may be taken by filing the notice and such sheriff's return with the clerk.”

Proof of substituted service in this case consists of an affidavit made by a private party, and is to the effect that neither the Western Mill Company nor its attorneys can be found within the county. But there is no return by the sheriff certifying that fact. We think the proof of service wholly insufficient. The statute has in explicit terms pointed out the method of procedure where actual service upon the party or

his attorney cannot be had, and has made "a return by the sheriff," the sole evidence, as we think, by which it is ascertained that actual service upon the party or his attorney cannot be made. No attempt has been made to comply with this statute, and we are not at liberty to disregard its requirements. Cases can be brought to this court only in the manner pointed out by the statute, and the method of procedure there provided is to the exclusion of all others.

It appears from the record that the attorneys for respondent Potvin were also attorneys for Leck. Notice of appeal was served upon them as attorneys for Potvin, and it is contended that this was sufficient to charge them with notice on behalf of Leck whom they also represented. The course of decision in this court is to the contrary. *Traders' Bank v. Bokien*, 5 Wash. 777 (32 Pac. 744); *Dewey v. South Side Land Co.*, 11 Wash. 210 (39 Pac. 368); *Casey v. Oakes*, 13 Wash. 38 (42 Pac. 621).

Lastly, it is urged that even if Stark, Leck and the Western Mill Company did appear in the action and were not served with notice of appeal, nevertheless the court should retain the case and determine the rights of the other parties; that the appeal in this case involves two separate cases which had been consolidated and a single decree entered, and it is urged that the question of priority between Potvin and the Cornell University can be determined upon this appeal without affecting the rights of Stark, Leck or the Western Mill Company. The failure to give notice to parties who have appeared in the action cannot be excused on the ground that the rights of appellants, and those upon whom the notice of appeal has been served can be determined without affecting the rights of parties not served. The consolidation of the causes pur-

suant to § 1674, Gen. Stat. (Vol. 1 of the Code), brought all of the lien claims into one action, and their adjustment was effected by one decree. It was for the legislature to determine the manner in which causes should be brought to this court, and we have repeatedly held that "under the provisions of our statute all the parties who had appeared in the action in the court below must be made parties to the appeal, either by joining therein, or having notice thereof served upon them." *Traders' Bank v. Bokien, supra*; *Dewey v. South Side Land Co., supra*; *Bellingham Bay National Bank v. Central Hotel Co.*, 4 Wash. 642 (30 Pac. 671); *Johnson v. Lighthouse*, 8 Wash. 32 (35 Pac. 403); *Fairfield v. Binnian*, 13 Wash. 1 (42 Pac. 632); *Casey v. Oakes*, 13 Wash. 38 (42 Pac. 621); *Jones v. Sander*, 2 Wash. 329 (26 Pac. 224); *Cadwell v. First National Bank*, 3 Wash. 188 (28 Pac. 365).

Stark, Leck and the mill company were, as to the appellants, as much "prevailing parties" as is the respondent Potvin, and, if we were to sustain appellants' contention, "the result would be that instead of the object of the statute — which was to make it sure that the rights of all the parties should be determined in a single appeal — having been accomplished, it would be possible that there would be two or more appeals before the rights of all the parties to the action would have been finally determined in this court." *Casey v. Oakes, supra*.

Appeal dismissed.

DUNBAR and ANDERS, JJ., concur.

HOYT, C. J., disqualified.

[No. 2380. Decided November 5, 1896.]

W. W. WATSON, *Appellant*, v. W. H. REED *et al.*, *Respondents*.

MISCONDUCT OF JURY—ASCERTAINMENT OF VERDICT BY LOT.

When a jury has determined upon a verdict in favor of a plaintiff in an action for the recovery of damages, there is no impropriety in the jury's resorting to lot to find the average sense of the jury upon the amount of the verdict to be returned, when there is no agreement to be bound thereby and the minds of the jurors are free to deliberate and act upon the result, using same as a basis of discussion in arriving at the amount of the recovery they should award.

Appeal from Superior Court, Yakima County.—Hon. CARROLL B. GRAVES, Judge. Reversed.

Frank H. Rudkin, for appellant.

Reavis & Englehart, and *Whitson & Parker*, for respondents.

The opinion of the court was delivered by

GORDON, J.—'This action was brought to recover damages for a breach of a contract to execute a lease. A verdict for the appellant, plaintiff below, in the sum of \$165, was returned by the jury, which verdict was thereafter set aside and a new trial awarded in the lower court upon the sole ground that it was "arrived at by a resort to the determination of chance or lot." From the order setting aside said verdict and granting a new trial the plaintiff has appealed.

Subdivision 2, § 400 of the Code of Procedure, makes the affidavits of one or more of the jurors admissible for the purpose of showing that a verdict was arrived at in the manner claimed in this case. The affidavits of two jurors who served in the cause were considered

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upon the hearing of the motion. In one of them it is stated that—

“As soon as ten jurors in the cause agreed upon a verdict in favor of the plaintiff the jury proceeded to ascertain and fix the amount of such verdict. The foreman of said jury suggested that each juror write down on a slip of paper the amount he deemed plaintiff entitled to; that said several amounts be added together and the sum so ascertained be divided by twelve; that each of the twelve jurors did so and the sum of the several amounts was divided by twelve which gave a quotient of about \$163.”

It is further stated,—

“That there was no agreement on the part of any of said jurors to return a verdict for the amount ascertained in the manner above stated, but that said method of ascertaining the amount was resorted to for the sole purpose of ascertaining the average sense of the jury on the question of damages; that the sum of \$165 was the final and only amount agreed upon by the jury in said cause, *and none of the jurors in said cause ever agreed to be bound by, or to return into court, a verdict for any other or different amount, or to be bound by the result of any lot or chance in arriving at the amount of said verdict.*”

Section 1 of the act of March 8, 1895, (Session Laws, p. 59), authorizes the return of a verdict in a civil action by ten or more jurors. We think the showing made was insufficient to authorize the setting aside of the verdict. The case differs from that of *Gordon v. Trevarthan*, 13 Mont. 387 (34 Pac. 185, 40 Am. St. Rep. 452), wherein it appeared that an agreement was entered into by the jury to arrive at the result by a quotient verdict, and it appeared that at least one juror was induced to assent to the verdict because of the agreement so reached. And so too in *Pawnee Ditch & Imp. Co. v. Adams*, 1 Colo. App. 250 (28 Pac. 662), the

verdict was obtained by averaging the estimates of the individual jurors *under an agreement to be bound by the result*. In the present case it appears that a requisite number of jurors had concluded that the plaintiff was entitled to a verdict and the marking was for the purpose of getting the average sense of the jury as to the amount of the recovery as a basis of discussion or further consideration, but there was no agreement or understanding that the average so obtained should be the sum of their verdict. In other words, the jurors and each of them were free to act on the result of the general average unrestricted and unembarrassed by any previous arrangement or agreement to be bound by the general average; and we agree with counsel for the appellant that there is no impropriety in a jury's resorting to this method for the sole purpose of arriving at an agreement, when the minds of the jurors are free to deliberate and act upon the result. And this view we think is sustained by the authorities. *Grinnell v. Phillips*, 1 Mass. 530; *Dorr v. Fenno*, 12 Pick. 521; *Dana v. Tucker*, 4 Johns. 487; Hayne, New Trial and Appeal, § 71; Hilliard, New Trials (2d ed.), p. 161, § 13.

The cause will be remanded and the lower court is directed to vacate its order awarding a new trial and to enter judgment upon the verdict in accordance with this opinion.

HOYT, C. J., and DUNBAR, SCOTT and ANDERS, JJ., concur.

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Syllabus.

[No. 2256. Decided November 6, 1896.]

THE STATE OF WASHINGTON, *Respondent*, v. FRANK
HOLEDGER, *Appellant*.

OBSCENE LITERATURE — INDICTMENT — SCIENTER — JUROR — QUALIFICATIONS — BIAS — MISCONDUCT OF JUDGE — INDORSEMENT OF WITNESSES' NAMES.

An indictment, charging defendant with knowingly, unlawfully, maliciously, scandalously and feloniously composing, editing, printing, selling, distributing and offering for sale, etc., a certain lewd, scandalous, obscene and indecent newspaper, sufficiently charges the commission of the offense defined by § 205, Penal Code, although there is no allegation of knowledge on the part of defendant as to the character of the publication, since such knowledge must necessarily be presumed from the fact of his editing and composing the publication.

An indictment for publishing, editing and selling obscene and indecent literature, which charges defendant with editing, printing, selling, distributing and offering for sale and distribution a certain lewd, scandalous, obscene and indecent newspaper, is not objectionable on the ground that it charges the commission of more than one crime, since all are but one offence, laid as committed in different ways.

Laws 1895, p. 139, providing that county commissioners shall select as jurors such only as are householders is not in violation of art. 1, § 21, of the constitution, which provides that the right of trial by jury shall remain inviolate.

In the examination of a juror upon his *voir dire* it is improper to ask him whether he would attach more importance or credibility to the testimony of a minister than to that of any one else.

The fact that the court asked counsel for defendant, in the presence of the jury, whether they had any objection to the separation of the jury before verdict, is not ground of reversal, in the absence of any proof that defendant was prejudiced thereby.

The indorsement of the name of an additional witness upon the information after the beginning of the trial, only entitles the defense to a continuance, and is not ground of error when a continuance for that reason is not applied for.

Appeal from Superior Court, Spokane County.—
Hon. NORMAN BUCK, Judge. Affirmed.

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34	204
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26	362
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Fenton & Saunders, and *James L. Crotty*, for appellant.

J. W. Feighan, Prosecuting Attorney, for The State.

The opinion of the court was delivered by

DUNBAR, J.—The appellant was indicted for the crime of publishing, editing and selling obscene and indecent literature in Spokane county, Washington. The essential part of the information was as follows :

“ Frank Holedger is hereby charged with the crime of publishing, editing and selling obscene and indecent literature, committed as follows, to-wit : That on the 12th day of January, A. D. 1895, at the county of Spokane and state of Washington, Frank Holedger then and there being, did then and there knowingly, unlawfully, maliciously, scandalously and feloniously compose, edit, print, sell, distribute and offer for sale and distribution a certain lewd, scandalous, obscene and indecent newspaper of the date of January 12th, 1895, commonly known as the Spokane Sunday Sun. Contrary to the statute,” etc.

To this information a demurrer was interposed on the following grounds: (1) That the said information does not substantially conform to the requirements of the Code of Washington; (2) that the facts charged in the information do not constitute a crime.

The appellant relies upon the statute which provides that the indictment or information must be direct and certain as it regards, (1) the party charged; (2) the crime charged; (3) the particular circumstances of the crime charged when they are necessary to a complete crime, as specified in § 1236, Code Proc., and § 1238, *idem*, which provides that “ the indictment or information must charge but one crime and in one form only, except that where the crime may be committed by the use of different means, the in-

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dictment or information may allege the means in the alternative." It is urged by the appellant that the facts charged in this information do not constitute a crime, that the words, "knowingly, unlawfully, maliciously, scandalously and feloniously," as used in the information, qualify the acts "compose, edit, print, sell, distribute and offer for sale and distribution;" that the information should allege that the defendant not only knowingly, unlawfully, scandalously and feloniously composed, edited, printed, etc., a certain lewd, scandalous, obscene and indecent newspaper, but that he should have done some one of these acts with the knowledge that the said paper was scandalous, obscene and indecent; that the *scienter* or guilty knowledge is one of the principal ingredients of this offence.

The statute upon which this information is based is § 205 of the Penal Code, and is to the effect that, —

"If any person shall import, print, publish, sell, lend, give away, distribute or show, or have in his possession, with intent to sell or give away or to show or advertise or otherwise offer for loan, gift, sale or distribution, any obscene or indecent book, magazine, pamphlet, newspaper, story-paper, writing-paper, picture, engraving, drawing or photograph, or if any person shall design, copy, draw, photograph, print, utter, publish or otherwise prepare any of the articles mentioned in this section, or shall write or print or cause to be written or printed, . . . he shall be punished," etc.

The appellant has cited a number of cases in support of this contention, but we do not think from an investigation of them that they are in point so far as this particular kind of a crime is concerned. For instance, in the case of *Commonwealth v. Boynton*, 12 Cush. 499, where an indictment charged that the

defendant "did knowingly sell unto one Jeremiah Barker, a certain piece of diseased, corrupted and unwholesome provision, to-wit, one hind leg of veal, the said Boynton not then and there making known fully to said Barker that the same was diseased, corrupted and unwholesome," etc., the indictment was held bad, and the court rightfully held that the guilty knowledge or evil intent of a party in selling meat was the foundation of the indictment, and it might very well happen that a person engaged in the business of selling meat would knowingly sell it, and of course he would knowingly sell it if he sold it at all, without knowing that it was diseased meat; and in a case of that kind, as a matter of course the allegation of the knowledge that the meat was diseased would be necessary.

But this is not a kindred proposition, for here the appellant is charged with knowingly, unlawfully, maliciously, scandalously and feloniously, composing, editing, printing, selling, distributing and offering for sale, etc., a certain lewd, scandalous, obscene and indecent newspaper. If one can edit and compose a publication without knowledge of its obscene character being conclusively presumed, then it would be idle to allege knowledge of its obscene character, because there would be no way of proving that he did have such knowledge. Such knowledge must be conclusively presumed from the fact of his editing and composing the publication, and we have no doubt that a person of reasonable understanding could readily determine what he was charged with by the knowledge conveyed in this information.

The other contention, that more than one crime is charged in the indictment, we think is clearly without foundation. In the case of *State v. Carr*, 6 Ore. 133,

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under a statute substantially like ours, it was held that the indictment was sufficient. That case was decided on the law as pronounced in 1 Bishop's Criminal Procedure, (3d ed.), § 586, which is as follows:

"If a statute makes it a crime to do this, or that, or that, mentioning several things disjunctively, all may indeed, in general, be charged in a single count; but it must use the conjunctive "and" where "or" occurs in the statute, else it will be defective as being uncertain. All are but one offence, laid as committed in different ways. And proof of it in any one of the ways will sustain the allegation. On the other hand, the indictment may equally well charge what comes within a single clause of the statute, and still it embraces the complete proportions of an offence."

This doctrine, we think, has been followed by the courts generally. We think the information was in all particulars good.

The second assignment of error is in relation to appellant's challenge and objection to the panel of jurors summoned and empaneled in the cause, based on the idea that the statute in relation to the qualifications of jurors, viz., page 139 of the Laws of 1895, which provides that the county commissioners shall select from the persons qualified to act as jurors the names of householders, is in conflict with § 21 of Art. 1 of the constitution of the state of Washington. This has been decided adversely to the appellant's contention by this court in a recent case, to-wit, *Redford v. Spokane Street Ry. Co.*, ante, p. 419.

Assignment three falls under the same ruling.

The fourth assignment is that the court erred in overruling the challenge of appellant to juror Calvert.

We are satisfied from the testimony that the juror Calvert was a householder and a proper juror.

The fifth assignment of error is that the court erred

in sustaining the objection of the state to the questions propounded to juror Calvert. The questions were: "Would you attach more importance or credibility to the word of a preacher outside of court than any other gentleman?" and second, "Would you attach more credence to the testimony of Dr. McInturff, a minister of the gospel, than that of any one else?" These questions are so apparently improper and irrelevant that we do not feel called upon to enter into a discussion of them.

Assignments six, seven and eight are of the same character.

The appellant complains in his ninth assignment that the court erred in asking counsel for appellant, in the presence and hearing of the jury if they had any objection to the separation of the jury. In the absence of any proof to the effect that the appellant was prejudiced in any way by the action of the court, we do not feel like reversing a case on this ground alone; but we desire to take occasion to say that considering the difficulty of making such a showing of injury by the party who claims to be aggrieved, we think it is a practice which should not be indulged in by trial courts, because, as appellant complains, if they did entertain any objection to the separation of the jury they were called upon to so state in the presence of the jury, and would thereby run the risk of incurring the displeasure of some juror. The court could very easily call counsel to him and ascertain privately and without the knowledge of the jury whether there were any objections to their separation.

The next assignment, viz., that the jury was not drawn in the manner and by the officers provided by law, we think cannot be sustained. Under the pro-

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viso to § 3, ch. 78, p. 139, of the Session Laws of 1895, we think the jury was properly drawn.

We are also satisfied from the record that the juror Claven was the person intended to be drawn under the name of Klawon.

The eleventh assignment is that the court erred in permitting the state, over the objection of the appellant, after the jury in the cause had been accepted and sworn to try the cause, to endorse the name of Albert J. Brill as a witness for the state upon the information. It has been frequently held by this court that such act on the part of the prosecuting attorney would only entitle the defense to a continuance. It not appearing from the record that a continuance was asked for in this cause, for the reason alleged, the objection will not be sustained.

The twelfth assignment is based on the insufficiency of the information and has already been discussed.

The allegations of error in regard to the overruling of the objection of appellant to certain testimony we think, without specially reviewing the questions, are without merit. The questions were all pertinent and admissible under the indictment.

The twenty-second assignment, that the court erred in overruling appellant's motion made at the close of the state's testimony, for a peremptory instruction to the jury to find a verdict for the appellant of not guilty, on the ground that there was no evidence to sustain any of the allegations in the information, and that the evidence was wholly insufficient in the law and in fact to sustain the charge against the defendant, cannot be sustained. From a review of the testimony in this case we think the evidence was amply sufficient to sustain the verdict.

Many instructions of the court are assigned as

error, and error is assigned for the reason that certain instructions asked for by the appellant were not given by the court. Many of the objections to the instructions are exceedingly strained and some of them seem to us to be entirely captious. On the whole we are satisfied that the law was correctly given by the court, and that the requests for instructions which were refused had either in substance been given by the court or did not embrace the law governing the case.

We do not think that the affidavit made by witness Meham is sufficient, conceding his right to make the affidavit at all, to work a reversal of the case.

The judgment will be affirmed.

HOYT, C. J., and SCOTT, ANDERS and GORDON, JJ., concur.

15 450
17 410

[No. 2039. Decided November 9, 1896.]

T. H. CASEY, *Respondent*, v. NORTHERN PACIFIC RAILROAD COMPANY *et al.*, *Defendants*, THOMAS F. OAKES *et al.*, *Receivers, Appellants*.

RECEIVERS — LIABILITIES FOR BREACH OF CONTRACTS PRIOR TO APPOINTMENT.

The receivers of a railroad company are not liable for breach of a contract to carry a passenger entered into by the company prior to their appointment.

Appeal from Superior Court, Spokane County.—Hon. W. J. C. WAKEFIELD, Judge *pro tem*. Reversed.

John R. McBride (*Ashton & Chapman*, of counsel), for appellants.

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Plummer & Thayer, and Winston & Winston, for respondent.

The opinion of the court was delivered by

HOYT, C. J.— It appeared from the complaint filed in this action that the plaintiff was the holder of a ticket issued by the Northern Pacific Railroad Company; that the defendants Oakes, Paine and Rouse were the duly appointed receivers of such company; that the other defendant, A. H. Simmons, was an employee of the receivers at and around the depot of the railroad company in the city of Spokane; that the plaintiff sought, by virtue of this ticket, to pass to the cars of the company, to be transported as agreed therein; that the defendant Simmons refused to allow him to do so, and abused and assaulted him in the depot building of said company; that by reason of this action of said Simmons he had been deprived of his rights under the contract for transportation contained in the ticket, and had been greatly injured in his person and feelings, to his damage in the sum of \$1,900.

After the evidence was all in, a motion to dismiss was made by each of the defendants. This motion was granted as to the railroad company and Simmons, but denied as to the receivers of the railroad company, against whom a verdict was rendered by the jury. The court could only have rightfully dismissed the action as to the railroad company and Simmons, and refused to dismiss it as to the receivers if, in its opinion, the action was upon the contract contained in the ticket. Its action would not have been justified if, in its opinion, the action was one of tort. If any of the defendants were guilty of a tort the defendant Simmons, who did all that was done, would certainly

have been guilty. But the court took the case from the jury as to him. Hence it must have found, either that the action was not one of tort, or that there had been no evidence introduced to show that a tort had been committed. In either case the receivers would have been entitled to a dismissal if the defendant Simmons was. It must follow that the case was submitted to the jury by reason of the court's being of the opinion that the receivers were liable by reason of their failure to carry out the contract entered into by the company before their appointment. But that they were not so liable was directly ruled by this court in the case of *Scott v. Rainier Power & Ry. Co.*, 13 Wash. 108 (42 Pac. 531). Hence, under the theory adopted by the court in the trial of the cause, it should not have been submitted to the jury, but should have been dismissed as to the receivers as it was as to the other defendants.

The judgment will be reversed, but by reason of the fact that something has been said in appellant's brief as to the dismissal as to Simmons having been by consent, though what is there said is not borne out by the record, the cause will be remanded for a new trial.

ANDERS and SCOTT, JJ., concur.

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[No 2149. Decided November 9, 1896.]

THE STATE OF WASHINGTON, *Respondent*, v. HENRY
ELSWOOD, *Appellant*.

INFORMATION—DUPLICITY—SPECIAL COUNSEL IN CRIMINAL PROSECUTION—DISCRETION OF COURT—LEADING QUESTIONS—SUFFICIENCY OF EVIDENCE.

An information against defendant for the crime of rape committed upon a female child under the age of twelve years, sufficiently charges one crime, and not two, when it alleges that defendant "feloniously did make an assault, and her the said [child] then and there feloniously did ravish, carnally know and abuse," etc., since the words charging assault must be construed as charging same only as included in the crime of rape.

It is within the discretion of the court to allow special counsel to aid the prosecuting attorney in the prosecution of a case, and such discretion will only be interfered with upon a showing of an abuse thereof.

When there is evidence tending to show every fact necessary to establish the guilt of defendant, the court is not warranted in taking the case from the jury.

The action of the court in allowing leading questions is a matter so largely within its discretion as to call for the interference of the appellate court only in extreme cases.

The supreme court will not set aside a verdict in a criminal case, when there is testimony tending to show every necessary fact, and when the court which tried the cause has refused to interfere with the verdict.

Appeal from Superior Court, Stevens County.—
Hon. JESSE ARTHUR, Judge. Affirmed.

S. G. Allen, and *John B. Slater*, for appellant.

C. A. Mantz, Prosecuting Attorney, for The State.

The opinion of the court was delivered by

Hoyt, C. J.—Defendant was convicted of the crime of rape and from the judgment and sentence imposed has prosecuted this appeal.

15	452
19	378
15	453
22	621
15	453
26	648
15	453
33	236

His first attack is upon the information, of which the substantial part was in the following language:

“Comes now C. A. Mantz, county and prosecuting attorney for Stevens county, state of Washington, and by this his information charges the defendant Henry Elswood of the crime of rape committed as follows, to-wit: The said Henry Elswood in Stevens county, state of Washington, on to-wit the 26th day of July, 1895, and before the filing of this information, in and upon one Ressie Lutjens, a female child, under the age of twelve years, to-wit of the age of ten years, feloniously did make an assault, and her the said Ressie Lutjens then and there feloniously did ravish, carnally know and abuse, contrary to the statute in such case made and provided.”

It is claimed that this indictment was bad, for the reason that it charged two distinct crimes; first, that of assault, and second, that of rape. The ground upon which this claim is made is that the section (Penal Code, § 28) upon which the information was founded has provided for two distinct crimes, one for rape upon an adult and another for one upon a child. We do not thus understand this section. We think it has provided for but one crime, that of rape; that it has provided the acts necessary to constitute the crime in the case of an adult, and also those which would constitute the crime in the case of a child. But in either case the offense therein defined is that of rape. This being so, and it being clear from the language of the information that it was the intent to charge a felonious assault, the fact that words were used which might have charged an assault independent of the charge of rape, does not show an intent to charge the crime of assault, excepting as the same is included in the crime of rape. The information fairly informed the defendant of the offense with

Nov. 1896.] Opinion of the Court—HOTT, O. J.

which he was sought to be charged and under our statute was sufficient.

The second error is founded upon the action of the court in allowing special counsel to appear to aid the prosecuting attorney in the trial of the cause; but in our opinion the action of the court in this matter was within its discretion and no abuse thereof being shown by the record such discretion will not be interfered with here.

A portion of the third ground upon which reversal is sought attacks the information, as to which it is not necessary that anything further should be said.

The other ground alleged under this point is that the evidence was such that the court should have taken the case from the jury and discharged the defendant. But since there was testimony tending to show every fact necessary to establish the guilt of defendant, we think the action of the court in refusing to take the case from the jury was what it should have been.

The fourth assignment of error is founded upon the action of the court in admitting and refusing to admit evidence offered upon the trial, and raises the question as to the sufficiency of the evidence to support the verdict.

The action of the court upon the trial, in allowing leading questions, is strongly urged as having been prejudicial error, but this is a matter so largely in the discretion of the lower court that, except in an extreme case, its action will not be interfered with, and that extreme case is not made to appear from this record.

As to the admission of testimony objected to and the refusal to admit testimony offered, it is sufficient to say that we have carefully examined the statement

of facts and fail to find in the rulings therein disclosed any ground for reversal.

Upon the question of the insufficiency of the evidence to support the verdict, there was, as we have already seen, testimony tending to show every necessary fact; and this being so, and the jury having acted thereon and rendered a verdict, and the court which tried the cause and heard the testimony given having refused to interfere with such verdict, the insufficiency of the testimony is not so apparent from the record as to warrant us in setting aside the verdict.

The judgment and sentence will be affirmed.

SCOTT, ANDERS, DUNBAR and GORDON, JJ., concur.

[No. 2193. Decided November 9, 1896.]

J. F. HART LUMBER COMPANY, *Appellant*, v. WYATT J. RUCKER, *Respondent*.

SALE OF SCHOOL LANDS — IMPROVEMENTS BY LESSEE — APPRAISAL —
RECOVERY OF VALUE — EVIDENCE.

The fact that improvements on school lands were placed thereon by plaintiff's assignor, in pursuance of an agreement between him and other persons as to their ownership, is not sufficient to defeat plaintiff's *prima facie* right to recover the value thereof in an action against the purchaser of such lands from the state, when such fact does not appear of record.

Where possession of school lands has been taken under a lease from the county commissioners, and improvements made thereon, a subsequent purchaser of such lands cannot escape liability for the value of such improvements by reason of any irregularity in the making of the lease.

A purchaser of school lands is estopped to claim that no appraisal of the value of the improvements put thereon by a lessee has been made by the board of county commissioners sufficient for the purposes of a *prima facie* right of recovery, when a letter from him-

15	456
16	347
17	600
18	227
20	384
16	456
32	368

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self to the board of state land commissioners, which was introduced in evidence, expressly calls attention to the appraisement, while representing that it was too high.

The liability of defendant for improvements on school lands, as the purchaser thereof, sufficiently appears from evidence showing that while the particular lot in question was struck off to another, it was with the understanding that defendant was to become the purchaser, and such understanding was carried out by the entry of defendant's name as purchaser, by the payment by him of the ten per cent. of the purchase price necessary to consummate the sale, and by the fact that, in a letter to the land commissioners seeking relief on account of the excessive appraisal of the improvements, no claim was made by him that he was not the purchaser at such sale.

The fact that the appraisement of the value of improvements on school lands was made at the time of the sale thereof, and not at the time the lands were appraised, will not invalidate the appraisement. (*Holm v. Prater*, 7 Wash. 207, distinguished.)

The purchaser of school lands who bids therefor with the expectation that he must pay the owner of improvements thereon for their appraised value, cannot defeat the recovery of such owner on the ground that a portion of the improvements are not on the land purchased but are on the tide land in front thereof.

Appeal from Superior Court, Snohomish County.—
Hon. JOHN C. DENNEY, Judge. Reversed.

C. W. Seymour, Stiles & Stevens, Coleman & Hart,
and *Sapp & Lysons*, for appellant.

Bell & Austin, and *Crowley, Sullivan & Grosscup*, for
respondent.

The opinion of the court was delivered by

HOYT, C. J.—This action was brought to recover of the purchaser of school lands the appraised value of the improvements upon the land purchased. After the evidence on the part of the plaintiff was all in, the court, upon motion of defendant, granted a non-suit, and the question presented on this appeal is as to

whether or not the evidence made out a *prima facie* case against the defendant.

The respondent sets out in his brief five propositions as to which it was necessary that the plaintiff should introduce evidence, and concedes that, if evidence sufficient to *prima facie* establish each of these five propositions was introduced by the plaintiff, the motion for a non-suit was wrongfully granted. These five propositions are stated in said brief as follows :

“First.—John F. Hart made upon lot number 11, section 16, township 29, N. R. 5 E., W. M., certain large and valuable permanent improvements, consisting of a saw mill, and improvements pertaining thereto, and dyking and slashing.

“Second.—These improvements were made by said Hart after obtaining from the state a valid lease of said lot from the authorized agents of the state.

“Third.—These improvements were subject to appraisal, and were appraised according to law by the authorized agents of the state.

“Fourth.—The defendant, Wyatt J. Rucker, became a purchaser of said lot.

“Fifth.—The plaintiff, Hart Lumber Company, became, before the commencement of this action, the owner of full and complete right and title to the claim made against the defendant, Wyatt J. Rucker, for the appraised value of said improvements.”

As to the first proposition there was abundant testimony to show that certain improvements had been made upon the land in question; that the same had been made by one John F. Hart, and that his interests therein had been assigned to the plaintiff. This testimony, *prima facie* at least, established the first proposition, and this *prima facie* showing was not overcome by reason of the fact that these improvements were made by Hart in pursuance of an agreement between himself and other persons as to their owner-

ship. Notwithstanding the existence of this agreement, the improvements having been put upon the land by Hart and he having assigned his claim therefor to the plaintiff, was sufficient, at least *prima facie*, to establish the right of plaintiff to recover the value of the improvements.

The second proposition was clearly established, if the board of county commissioners had authority to make the lease introduced in evidence, and whether or not they had such authority could not concern the defendant. It purported to give the right to the lessee named therein to take possession of the land in question, and thereunder possession was taken and improvements made, and a stranger to the transaction, who would otherwise be liable for the value of the improvements, could not escape such liability by reason of any irregularity in the making of the lease.

That these improvements were appraised, by the board of county commissioners before the sale, was attempted to be shown by the introduction of copies of a portion of the records of Snohomish county, and by proof as to what transpired at the time of the sale. These were, in our opinion, sufficient to *prima facie* establish the fact of such appraisal. But, even if they were not, defendant is not in a position to question the fact that an appraisement had been made. A letter from him to the board of state land commissioners was introduced in evidence, upon which he asked such board to act officially, and in that letter there was a statement that the improvements on the lot had been appraised just before the sale at the sum of \$48,000. Having stated this fact as a foundation for a claim for relief by the board, he thereafter was not in a condition to deny the fact of such appraisement in any matter growing out of the alleged purchase by

him of the lot in question. It is true that in such letter he claimed that the appraisal was fraudulent and that the actual value of the improvements did not exceed the sum of \$8,000. But if the appraisal was actually made, proof of that fact would be sufficient to make out a *prima facie* case in favor of the plaintiff; and if the fact that it was fraudulent would constitute a defense, the fraud would have to be proven.

As to the fourth proposition, it sufficiently appeared from the evidence that the lot in question, with others, was in form struck off to James J. Hill, but that at the time it was so struck off it was understood that defendant was to become the purchaser of the lot in question, and James J. Hill of the other lands included in the parcel sold. This understanding was carried out by the defendant's name being entered as purchaser of the lot in question, and by the payment by him of the ten per cent. of the purchase price required to consummate the sale. Under these circumstances, he is not in a condition to claim that he was not in fact the purchaser of the lot in question, and especially is this so in view of the fact that, in the letter hereinbefore referred to, he, though seeking to avoid the sale, did not claim that he was not in fact the purchaser at such sale.

The fifth proposition has been substantially covered by what was said as to the first. If others than Hart were interested in the improvements, that fact did not appear of record, and a conveyance by him to the plaintiff would at least *prima facie* convey a good title.

There was then, in our opinion, testimony tending to establish each of the facts necessary to enable the plaintiff to recover, if, under the law, there could have

Nov. 1896.] Opining of the Court — Hoyt, C. J.

been any appraisement of the improvements upon the land by the commissioners at the time it was made. From what is said in the briefs it is probable that the court construed the case of *Holm v. Prater*, 7 Wash. 207 (34 Pac. 919), to negative the right of the commissioners to make such appraisement. What was held in that case was that an appraisement of the improvements having been once made the fact that other improvements were placed thereon before the sale would not entitle the owner thereof to a second appraisement. But in the case at bar there was nothing tending to show that there had been any appraisement of the improvements prior to the one in controversy. It is true that there was some testimony tending to show that an appraisement of the land had been before made. But if from that fact an inference would flow that the improvements had also been appraised, such inference was negatived by testimony showing that the commissioners understood that the appraisal of the improvements must be as of the day of the sale.

We have not overlooked the extended and able discussion as to the rights of the parties growing out of the alleged fact that much of these improvements were on tide lands in front of the lot, and not upon the lot itself; but, under our view of the law, the defendant is not in a position to take advantage of that fact, if fact it was. The appraisement having stated that the improvements were upon the lot in controversy, the defendant must be presumed to have bid with the expectation that he must pay to the owner thereof the amount of such appraisement, and while we will not now decide as to the liability of the purchaser for improvements appraised as a part of the land purchased, if in fact they are upon an entirely

different lot, we do hold that under the circumstances disclosed by the evidence in this case the purchaser cannot take advantage of the fact that some portion of the improvements were upon tide land in front of the upland purchased by him.

As to what would be the effect upon the rights of the owner of improvements upon school land to collect their appraised value from the purchaser thereof, if such improvements had been fraudulently made or appraised, we shall not now decide. It is sufficient to say that at the time plaintiff rested there was no sufficient showing that the right of plaintiff to recover had been affected by any fraud in the appraisement.

The judgment will be reversed and the cause remanded with instructions to deny the motion for non-suit and proceed with the trial of the cause in accordance with this opinion.

SCOTT, ANDERS and GORDON, JJ., concur.

[No. 2228. Decided November 9, 1896.]

W. B. ROBERTS *et al.*, *Appellants*, v. DAVID S. PRESCOTT *et al.*, *Respondents*.

WARRANTS OF SCHOOL DISTRICTS — INDORSEMENT BY COUNTY TREASURER — LIABILITIES.

The provisions of Laws 1893, p. 268, § 7, making it the duty of the county treasurer not to register and indorse warrants issued by the officers of school districts unless the signatures thereon correspond with the signatures of the officers of the district on file in his office, are intended for the protection, not of the public at large, but of the county and the school districts therein, and no action will lie against a treasurer and his sureties, by the holder of a forged school district warrant, who claims to have purchased same on the strength of such treasurer's indorsement.

Nov. 1896.]

Argument of Counsel.

Appeal from Superior Court, Spokane County.—
Hon. NORMAN BUCK, Judge. Affirmed.

Cyrus Happy, for appellants:

A public officer is liable upon his bond for misfeasance, malfeasance or nonfeasance, in respect to ministerial duties which the law imposes upon him. *Mechem*, Public Officers, §§ 664, 665; *Adsit v. Brady*, 4 Hill, 630 (40 Am. Dec. 305); *Robinson v. Chamberlain*, 34 N. Y. 389; *Hover v. Barkhoof*, 44 N. Y. 113; *Lusk v. Carlin*, 4 Scam. 395; *Lammon v. Feusier*, 111 U. S. 17; *Owen v. Hill*, 67 Mich. 43; *Raynsford v. Phelps*, 43 Mich. 342 (38 Am. Rep. 189); *Amy v. Supervisors*, 11 Wall. 136; *Mace v. Gaddis*, 3 Wash. T. 125; *Fulton Fire Ins. Co. v. Baldwin*, 37 N. Y. 648; *Bennett v. Whitney*, 94 N. Y. 303; *Clark v. Miller*, 54 N. Y. 528; *Merritt v. McNally*, 36 Pac. 44; *Hayes v. Porter*, 22 Me. 371; *Nickerson v. Thompson*, 33 Me. 433; *Tardos v. Bozart*, 1 La. An. 199; Cooley, Torts (2d ed.), p. 458; Shearman & R., Negligence, 198. Where a duty is imposed by statute and no remedy is prescribed, a common law right of action arises. *County Commissioners v. Duckett*, 83 Am. Dec. 557, and notes.

James E. Fenton, for respondents :

The duties imposed by Laws 1893, p. 268, § 7, upon the county treasurer are duties owing solely to the public, and no liability is incurred to the individual, however much he may be injured by the non-performance or the negligent performance of such duties. *Garlinghouse v. Jacobs*, 29 N. Y. 297; *Butler v. Kent*, 19 Johns. 223 (10 Am. Dec. 219); *Moss v. Cummings*, 44 Mich. 359; *Bartlett v. Crozier*, 17 Johns. 439 (8 Am. Dec. 428); *State v. Harris*, 89 Ind. 363 (46 Am. Rep.

169); Mechem, Public Officers, § 598; Cooley, Torts, pp. 379, 381, 382.

Respondents also contend that said orders are not negotiable. *Van Vacter v. Flack*, 40 Am. Dec. 100. A school order drawn upon a treasurer of a district township by the president and secretary thereof, is not a negotiable instrument, and the assignee thereof takes it subject to all equities and defenses that it would have been subject to in the hands of the payee. *Eastman v. District Township*, 40 Iowa, 438; *National Bank v. Independent District*, 39 Iowa, 490; *Shepherd v. District Township*, 22 Iowa, 595; *Clark v. Des Moines*, 19 Iowa, 199; *Allen v. McCreary*, 14 South. 320; *Capital Bank v. School District*, 48 N. W. 363.

The opinion of the court was delivered by

Hoyt, C. J.—This action was brought against the treasurer of Spokane county and the sureties on his bond, to recover damages alleged to have been occasioned by the wrongful act of the treasurer in indorsing certain warrants which appeared to have been issued by the officers of certain school districts in said county, which it was alleged they were induced to purchase by reason of the fact of such indorsement by the treasurer.

The ground upon which it was claimed that the action of the treasurer was wrongful was that in making the indorsements he acted in violation of § 7 of the act of March 10, 1893 (Laws, p. 268), which made it his duty not to register and indorse such warrants unless the signatures thereon corresponded with the signatures of the officers of the district on file in his office; and the first question presented by the record is as to the object for which this section was enacted. If such object was solely for the pro-

tection of the county and the school districts therein, the plaintiffs could not maintain an action for its violation by the county treasurer. If it was enacted for the benefit of the public and to encourage dealing in the warrants of school districts, the right of the plaintiffs to maintain the action for its violation might, under a certain line of authorities, be sustained. Hence, it is necessary to first determine as to the object of the enactment of this section as disclosed in its language.

Warrants of a school district, though payable to order or bearer, are not negotiable under the rules of the law merchant. They may be transferred from one to another, but such transfer has no effect upon any equities which may exist in favor of the district against such warrants. This being so it is not reasonable to suppose that the legislature had in view the protection of those who should buy such warrants, when it enacted the section under consideration. It is more reasonable to suppose that this section was passed for the purpose of providing an orderly course for the transaction of business as between the county treasurer's office and the several school districts of the county. It was in the interest of school districts that the treasurer should not pay warrants without proof of their genuineness, and it was also to their interest that warrants should not be registered as having been issued by them and entered on the books of the treasurer without like proof of their genuineness. To enable the treasurer to determine as to the genuineness of such warrants it was necessary that there should be accessible to him the genuine signatures of the officers authorized to issue the warrants. This being so, it will not be presumed that such provisions were for the benefit of the public at large, unless the intent to

that end clearly appears. If the warrants were intended to circulate as negotiable paper, there might be reason for some provision which would prevent their getting into circulation before their genuineness had been determined. But as they are not negotiable and not intended for general circulation, there could be little need for any provision for the protection of those into whose hands they might come. The county treasurer's office is accessible to the public and it is equally within the power of one who is about to buy a school warrant to determine as to its genuineness by comparison with the signatures on file in such office as for the treasurer himself to do so.

All things considered we are satisfied that the lower court was right in holding that this section was passed for the benefit of the school districts and of the county treasurer's office, and not at all for the benefit of the public at large.

Hence, the judgment rendered by it for the defendants was right and must be affirmed.

SCOTT, ANDERS, DUNBAR and GORDON, JJ., concur.

[No. 2402. Decided November 9, 1896.]

ATLANTIC TRUST COMPANY, *Trustee, Respondent*, v.
FREDERICK C. BEHREND, *Defendant*, W. H. PLUM-
MER, *et ux.*, *Appellants*.

MORTGAGES — FORECLOSURE BY ASSIGNEE — SUFFICIENCY OF TITLE —
ESTOPPEL.

Where an assignment of a mortgage held by a mortgage company has been executed by one of its vice-presidents, under the seal of the corporation, and it is shown that it had been the custom of this officer for a considerable period of time prior thereto, to assign like

Nov. 1896.] Opinion of the Court—HOYT, C. J.

securities, the corporation is estopped to afterwards question his authority in that respect.

If an assignment of a mortgage is sufficient to estop the mortgagee from disputing it, the mortgagor cannot raise any question as to the validity of the assignment in an action of foreclosure instituted by the assignee.

Appeal from Superior Court, Spokane County.—
HON. JAMES Z. MOORE, Judge. Affirmed.

W. J. Thayer, for appellants.

O. G. Ellis, and *H. D. Crow*, for respondent.

The opinion of the court was delivered by

HOYT, C. J.—This appeal is from a decree foreclosing a mortgage, and the only reason suggested why such decree should be reversed is that the evidence was not sufficient to show that the mortgage and note accompanying the same had been assigned to the plaintiff in the action. It was claimed that the evidence was insufficient for two reasons; first, that the Lombard Investment Company to whom the mortgage was made had no power under its articles of incorporation as set out in the pleadings to make the assignment, and second, that if it did have such power, the purported assignment was not shown to have been executed by authority of the corporation.

We do not find it necessary to enter into the technical discussion contained in the briefs of counsel, for the reason that the defendant was not interested in this assignment except to the extent of seeing that the Lombard Investment Company had so parted with its title to the plaintiff that it could not afterwards claim ownership of the note and mortgage. Hence, it is immaterial whether or not all the forms prescribed for the assignment of the mortgage had been observed, if enough had been done by the mortgagee to estop it

or those claiming under it from afterwards asserting title to the mortgage. That such was the effect of what was shown by the evidence seems to us clear. It was proven that the assignment was executed by one of the vice-presidents of the corporation, and that the seal of the corporation was attached thereto; that this same officer had been in the habit of assigning like securities at different times extending over a considerable period. This being so, we are under the impression that the corporation which had thus allowed one of its officers to act and use its seal to authenticate the papers made by him, could not thereafter question his authority to do what he had done; and if the assignor could not question the assignment, then the assignee took such a title as it was necessary for it to have to maintain an action to foreclose the mortgage.

The decree will be in all things affirmed.

GORDON, SCOTT, ANDERS and DUNBAR, JJ., concur.

15	468
19	266

[No. 2318. Decided November 10, 1896.]

THE STATE OF WASHINGTON, *Respondent*, v. E. OWENS,
Appellant.

APPEAL — ERRORS NOT URGED BELOW — MOTION FOR NEW TRIAL.

Errors not raised in the court below cannot be urged on appeal.

The denial of a motion for a new trial will not be disturbed on appeal, when the motion presented no questions not already passed upon by the court during the progress of the trial, and when no exceptions had been saved to errors committed by the court.

Appeal from Superior Court, Yakima County.—
Hon. CARROLL B. GRAVES, Judge. Affirmed.

H. J. Snively, and *Fred Miller*, for appellant.

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Ira P. Englehart, Prosecuting Attorney, and *F. H. Rudkin*, for The State.

The opinion of the court was delivered by

HOYT, C. J.—Appellant was tried upon an information charging him with assault with intent to commit murder. A verdict of guilty was returned and thereon, after a motion for a new trial had been denied, judgment and sentence was duly entered.

Four specifications of error are relied upon as grounds for reversal: (1) That the court erred in allowing the prosecuting attorney to cross-examine defendant's witnesses as to particular acts of bad conduct alleged to have been committed by the defendant; (2) for like error in permitting the prosecuting attorney to cross-examine the defendant as to like particular acts; (3) that the court erred in permitting two witnesses to testify in rebuttal as to particular acts of bad conduct on the part of the defendant; and (4) error in overruling the motion of the defendant for a new trial.

If the appellant was in a situation to derive any benefit from the action of the court as to the matters complained of, some important questions of law might be presented for our determination, but his treatment of the matter in the court below was such that he is not in a position to take any advantage of any of the allegations of error, unless it is the fourth. As to the first two, he made no objection to the admission of the testimony as to which he is now complaining. Not only did he fail to object to the questions asked his witnesses upon cross-examination, but upon their re-examination himself went fully into the subject matter as to which such witnesses had been cross-examined. As to the third assignment, the only

objection that was made to the testimony, the admission of which is claimed to have constituted reversible error, was that it was not proper in rebuttal. There was no suggestion made that the objection to such testimony was based upon the ground that it was not competent for the state to show specific acts of bad conduct upon the part of the defendant, and no such claim having been made in the court below, it cannot avail appellant here.

The motion for a new trial, the denial of which is the foundation for the fourth assignment of error, presented no questions not already passed upon by the court during the progress of the trial, and the defendant not having been in a position to avail himself of the errors, if any, which the court had committed, by reason of the fact that he had saved no exception thereto, the motion was properly denied.

The judgment and sentence will be affirmed.

ANDERS, SCOTT, DUNBAR and GORDON, JJ., concur.

[No. 2336. Decided November 10, 1896.]

C. E. PERKINS, *Receiver of the Aberdeen Cedar Manufacturing Company, Appellant*, v. THE MITCHELL, LEWIS & STAYER COMPANY, *Respondent*.

APPEAL — INSUFFICIENCY OF BRIEF.

When the brief of appellant fails to point out the errors relied upon for a reversal, the brief will, on motion, be struck from the record, and the judgment affirmed.

Appeal from Superior Court, Chehalis County.—
Hon. MASON IRWIN, Judge. Affirmed.

M. J. Cochran, and *J. B. Bridges*, for appellant.

Shank & Smith, for respondent.

15	470
423	282
15	470
30	59
15	470
434	532
15	470
42	607

The opinion of the court was delivered by

GORDON, J.—This cause was tried below without a jury and findings of fact and conclusions made upon which a decree was entered in favor of the defendant (respondent here). A motion was made in this court to strike the brief of appellant, and for affirmance of the judgment, upon the ground that appellant had not complied with rule VIII of this court, in that he failed to make a reference in the statement of his case to the transcript for verification; and for the further reason that “he has not complied with the laws of the state, or rules of this court by pointing out in his brief the errors relied upon for reversal.” Upon oral argument of the motion to dismiss we were disposed to consider that some of the findings of the lower court were sufficiently challenged by the brief, and hence we heard argument on the merits. Upon further examination a majority are convinced that the motion should have been granted upon the authority of *Haugh v. Tacoma*, 12 Wash. 386 (41 Pac. 173). It is utterly impossible to determine from the brief what appellant relies upon for a reversal. No errors are assigned or pointed out beyond the statement that—

“Appellant contends, that, under the proofs, the first three findings of the lower court are wholly immaterial; that the fourth is absolutely contradicted by the testimony, which shows conclusively that the date of the articles of incorporation was the date of its organization, and also the date when it took possession of its property, the date of the issuance of the stock being wholly immaterial, as its issuance at all was wholly immaterial. . . . As to the sixth and seventh findings, neither of them is worthy of notice.”

Upon the merits, however, the decree must be affirmed. There were in all seven findings. To each of them the appellant excepted. The brief informs

us that five of them are "wholly immaterial" and therefore harmless. As to finding number five no mention is made, and number six is the only one objected to, but we are not satisfied that it is without sufficient evidence to support it, and, indeed, we think that even if this finding was disregarded the decree should nevertheless stand.

Affirmed.

DUNBAR, SCOTT and ANDERS, JJ., concur.

HOYT, C. J., dissents.

[No. 2371. Decided November 10, 1896.]

W. S. ROGERS, *Administrator, Respondent*, v. PAUL J. STROBACH, *Executor, Appellant*.

WILLS — CONSTRUCTION — RIGHTS OF LEGATEE'S ADMINISTRATOR.

A will bequeathing to each of the testator's two children one-half of all the moneys that may be realized from the sale of all his real and personal property, to be paid to them on their attaining the age of twenty-one years respectively, is a devise to the children and not to the executor, though the will may further provide that all the property is devised to an executor, in trust, with power to sell same and invest the proceeds in securities, until the children attain their majority, when principal and interest is to be paid over to them.

Upon the death of one of the devisees under such will before having attained his majority, the administrator of his estate is entitled to demand and receive his portion from the executor.

Appeal from Superior Court, Spokane County.—
Hon. NORMAN BUCK, Judge. Affirmed.

Adolph Munter, for appellant.

R. E. Porterfield, for respondent.

Nov. 1896.] Opinion of the Court—Horr, C. J.

The opinion of the court was delivered by

Horr, C. J.—Upon a petition filed in the matter of the estate of William I. Dehning in behalf of the administrator of the estate of Heinrich Dehning an order was made by the superior court of Spokane county directing the executor of the estate of William I. Dehning to deliver to said administrator a certain portion of said estate, which it was alleged had been devised to said Heinrich Dehning in his lifetime and had passed to his administrator upon his death. From this order the executor of the estate of William I. Dehning has prosecuted this appeal.

Two reasons are suggested why the order should be reversed. First, that no notice was given of the hearing of the petition upon which it was founded, and second, that under the will of William I. Dehning no part of his estate passed to Heinrich Dehning during his lifetime. The record does not bear out the alleged fact upon which the first claim is founded. It not only does not appear that no notice was given, but it affirmatively appears that the notice required by the statute was given, and that, if it was not, no objection on that account was interposed to the hearing of the petition in the court below.

The second ground of reversal is founded upon the claim that under the will of William I. Dehning all his property passed to his executor, to be by him paid to the children therein named when they reached the age of twenty-one years, and that Heinrich Dehning having died before he reached that age, nothing passed under the will to his representatives; that thereunder the other child became entitled to the entire estate when he should reach the age of twenty-one.

There is much discussion as to who were, under the laws of Montana, the heirs of Heinrich Dehning, but

that entire discussion is foreign to the issues presented. A duly appointed administrator of his estate was in court, and if the executor of the estate of his father had any property to which his estate was entitled, such administrator was entitled to its possession, and the question as to whom it would descend to must be determined in the course of the administration of his estate. The provisions of the will, which it is necessary to interpret, are in the following language:

"I. I bequeath to each of my children, Heinrich Dehning and Louis Dehning, one-half of all the monies that may be realized from the sale of all my personal and real property of whatsoever kind, the money to be paid to them respectively when they obtain the age of twenty-one.

II. I give and devise all my personal and real property of whatsoever kind and nature to Paul J. Strobach, in trust, for the execution of my will, with power to sell and dispose of the same at public or private sale at such times and upon such terms and in such manner as to him shall seem meet.

III. I direct the said Paul J. Strobach, whom I hereby appoint executor of this my last will, to invest all monies received by him as said executor, after paying all the expenses of my last sickness and of the funeral expenses, in mortgage or other interest bearing securities, as he may deem best, and to pay over to my said children, Heinrich Dehning and Louis Dehning, on their respectively arriving at the age of twenty-one years, one-half to each of all monies principal and interest then held by him as executor."

And thereunder it must be held that the devise was to the children and each of them, and not to the executor. If it had been the intent of the testator to devise to his executor for the use of his children and not to make any direct devise to them, the clause first above set out would have been entirely unnecessary. But that clause was not only inserted, but was given such

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Argument of Counsel.

form as to clearly show an intention to devise the property directly to the children therein named, and this being so, the provision as to the duty of the executor in reference thereto set out in the last paragraph could not take away its effect.

Under the will, the right to half of the property passed to Heinrich Dehning, and upon his death became part of his estate, and the administrator thereof was entitled to its possession.

The judgment appealed from will be affirmed.

GORDON, DUNBAR, SCOTT and ANDERS, JJ., concur.

[No. 2311. Decided November 11, 1896.]

NORTHWESTERN & PACIFIC HYPOTHEEK BANK, *Respondent*, v. STELLA B. SUKSDORF, *Appellant*.

REMOVAL OF CAUSES — TIME FOR APPLICATION.

A nonresident defendant is not entitled to have an action for the foreclosure of a mortgage transferred to the federal court, when the complaint states but a single cause of action against all the defendants, and some of them, aside from the nonresident defendant, are necessary parties to a complete determination of the plaintiff's rights.

An application by a defendant for a transfer of the cause to the federal court must be made before the expiration of the time fixed by statute within which the defendant is called upon to answer, and such right cannot be enlarged by an extension of time in which to answer.

Appeal from Superior Court, Spokane County.—
Hon. JAMES Z. MOORE, Judge. Affirmed.

Samuel R. Stern, for appellant:

The extension of time to answer by the court, or by

stipulation of the parties, does not deprive the defendant of the right of removal. *Wilcox, etc., Guano Co. v. Phoenix Ins. Co.*, 60 Fed. 929; *Peoples' Bank v. Aetna Ins. Co.*, 53 Fed. 161; *Rycroft v. Green*, 49 Fed. 177; *Turner v. Railway Co.*, 55 Fed. 689; *Kansas City, etc., R. R. Co. v. Daugherty*, 138 U. S. 298; *Winberg v. Berkeley County Ry. Co.*, 29 Fed. 721; *Gavin v. Vance*, 33 Fed. 84; *McKeen v. Ives*, 35 Fed. 801; *Lockhart v. Memphis, etc., R. R. Co.*, 38 Fed. 274; *Amsden v. Norwich Union Fire Ins. Society*, 44 Fed. 516; *Craven v. Turner*, 19 Atl. 864; Dillon, Removal of Causes, (5th ed.), § 118.

Blake & Post, for respondent:

Appellant had no right to a removal of the cause. The complaint states but a single cause of action against all the defendants. Each and all of the defendants were necessary and proper parties to a complete adjudication upon plaintiff's rights. The ground upon which the removal is claimed is that of diverse citizenship under the separable controversy clause of the statute. *Ayres v. Wiswall*, 5 Sup. Ct. 90; *Coney v. Winchell*, 6 Sup. Ct. 366; *Fidelity Ins. Co. v. Huntington*, 6 Sup. Ct. 733; *Torrence v. Shedd*, 12 Sup. Ct. 727; *Kaitel v. Wejlie*, 38 Fed. 866; *Security Co. v. Pratt*, 32 Atl. 398; *Wilson v. Oswego Tp.*, 151 U. S. 56. Failure of one of the defendants to join in the petition is fatal to the right of removal when there is no separable controversy. *Thompson v. Railway Co.*, 60 Fed. 773; *Western Union Telegraph Co. v. Brown*, 32 Fed. 337.

The petition and bond were not filed seasonably. *Gerling v. Baltimore, etc., R. R. Co.*, 14 Sup. Ct. 538; *Dickson v. Western Union Telegraph Co.*, 38 Fed. 377; *Pullman Palace Car Co. v. Speck*, 113 U. S. 84; *Greg-*

ory v. Hartley, 113 U. S. 746; *Austin v. Gagan*, 39 Fed. 626; *Spangler v. Atchison, etc., R. R. Co.*, 42 Fed. 305; *Delbanco v. Singletary*, 40 Fed. 177; *Ruby Canyon Gold Mining Co. v. Hunter*, 60 Fed. 305.

The opinion of the court was delivered by

SCOTT, J.—The error complained of in this case was the denial of the appellant's application for a transfer of the cause to the federal court. The action was brought to foreclose a mortgage given by the appellant and her husband, Henry F. Suksdorf, upon land in Spokane county. The other defendants were represented as claiming some interest in said lands, which, it was alleged, was subsequent to the plaintiff's mortgage. The defendants were served with process in said action, the service upon appellant being by publication. She was a resident of the state of Oregon. She appeared in the action on September 16, 1895, and made a motion for security for costs. Thereafter, on October 14th, the default of all the defendants excepting appellant was entered. A motion for judgment made by the plaintiff was denied and appellant was granted an extension of time until October 23, 1895, within which to answer. On said last date appellant made the application in question for a transfer of the cause to the federal court, which was denied.

There was no error in denying the application for a transfer. The complaint stated but a single cause of action against all the defendants, and they, or some of them at least, aside from appellant, were necessary parties to a complete determination of the plaintiff's rights, and there was no such separable controversy as would entitle the appellant to a transfer of the cause.

Furthermore, the application was properly denied in consequence of not having been seasonably made. Appellant was in default. The extension of time which was granted was to allow her to answer, and should not be held as having enlarged the time within which she could apply for a transfer of the cause to the federal court, as such application should have been made before the expiration of the time fixed by statute within which she was called upon to answer.

Affirmed.

HOYT, C. J., and DUNBAR, ANDERS and GORDON, JJ.,
concur.

[No. 2330. Decided November 11, 1896.]

D. M. OSBORNE & Co., *Appellant*, v. CYRENUS E. STEVENS *et al.*, *Respondents*.

ACTION ON PROMISSORY NOTE — PLEADING — ALLEGATION OF OWNERSHIP.

In an action on promissory notes by an indorsee thereof, the complaint is sufficient as against general demurrer attacking an averment of ownership in plaintiff, which is alleged as follows: "That for value and before maturity, Alexander A. Munson in dorsed said notes by writing across the back of each before delivery the name 'Alexander A. Munson.' That plaintiff is now the owner and holder of said notes and mortgage."

Appeal from Superior Court, Kittitas County.—
Hon. CARROLL B. GRAVES, Judge. Reversed.

W. S. Smith, for appellant.

Ralph Kauffman, for respondents.

The opinion of the court was delivered by

HOYT, C. J.—The superior court sustained a demur-

Nov. 1896.]

Opinion of the Court—HOTT, C. J.

rer to the complaint filed in this action, and, the plaintiff electing to stand upon such complaint, judgment was entered against it, from which it has prosecuted this appeal. The only suggestion as to the insufficiency of the complaint was that the title to the notes upon which the action was brought was not shown to be in the plaintiff. It appeared from the complaint that the notes were made to one Alexander A. Munson, and the allegations as to the ownership of the plaintiff were —

“That for value and before maturity Alexander A. Munson indorsed said notes by writing across the back of each before delivery the name ‘Alexander A. Munson.’ That plaintiff is now the owner and holder of said notes and mortgage.”

These allegations were not so full and definite as they should have been,—and the complaint on that account might have been open to a motion to make more definite and certain—but they were, in our opinion, sufficient when attacked by general demurrer. The old rule as to the strictness with which pleadings shall be construed against the pleader has been much modified under the reformed procedure, and thereunder it is held that pleadings shall be aided by all intendments which reasonably flow from the language used. The allegations of this complaint, aided by such intendments, were sufficient to show title in plaintiff to the notes in question.

The judgment will be reversed and the cause remanded with directions to overrule the demurrer to the complaint and proceed with the cause.

ANDERS, SCOTT, DUNBAR and GORDON, JJ., concur.

[No. 2332. Decided November 11, 1896.]

A. PERCIVAL *et al.*, Respondents, v. COWYCHEE AND
WIDE HOLLOW IRRIGATION DISTRICT, Appellant.

STATUTES—CONSTITUTIONALITY—SCOPE OF TITLE.

The title of an act showing that its object is to provide for the organization and government of irrigation districts and the sale of bonds arising therefrom is not broad enough to embrace a provision in the act for validating the indebtedness of a district previously organized and the levying of a tax to pay the same.

Appeal from Superior Court, Yakima County.—
Hon. H. B. Rigg, Judge *pro tem.* Affirmed.

*H. J. Snively, Fred Miller, Reavis & Englehart, and
Whitson & Parker, for appellant.*

Frank H. Rudkin, for respondents.

The opinion of the court was delivered by

HOTT, C. J.—The only authority for the levy of the tax, the collection of which was in controversy in this action, was the provision of the act of March 22, 1895, (Laws 1895, p. 451, § 27), which provided that:

“Whenever the board of directors of any district heretofore formed under this act shall have attempted to incur any indebtedness prior to this amendment going into effect, and when the only ground of the invalidity of such indebtedness is that the board of directors was not authorized to incur such indebtedness so contracted by said board, such indebtedness is hereby declared valid and binding upon said district, and the said directors are authorized to make an assessment of the property in said district as provided by this act as amended and to levy a tax upon said property as other levies are required to be made to pay such debts; *Provided*, such indebtedness shall not exceed the sum of \$5,000.”

15	480
25	128
15	480
28	388
15	480
28	539

If this provision was in force it was sufficient to authorize the levy in question, but it is claimed that it is void for the reason that it is not within the title of the act, and hence in violation of § 19 of art. 2 of the constitution. The title of the act in which the provision is contained is in the following language:

“An Act to amend an act providing for the organization and government of irrigation districts and the sale of bonds arising therefrom, and declaring an emergency, the same being §§ 1, 2, 4, 10, 16, 17, 18, 19, 20, 22, 24, 25, 26, 27, 28, 29, 30, 31, 33, 34, 35, 36, 38, 39, 40, 42, 59 and 70, approved March 20th, 1890, and declaring an emergency.”

The wording of this title is such as to make it difficult to determine the exact title of the act of which it was amendatory. It was in the following language:

“An Act providing for the organization and government of irrigating districts and the sale of bonds arising therefrom, and declaring an emergency.”

It will appear from a comparison of the two titles that there is no language used in the one to the amendatory act which in any manner extends the title to the original act. The latter act is simply amendatory of the former one, and the subject matter embraced in the title is the same. Hence, the question presented for decision is as to whether or not a title which shows nothing more than that the act is to provide for the organization and government of irrigation districts and the sale of bonds arising therefrom is broad enough to warrant the enactment thereunder of a provision for the validating of the indebtedness of a district which might have been organized thereunder, and the levying of a tax to pay the same.

That the provision in the constitution in question

should be reasonably construed and legislation sustained which fairly comes within the subject matter embraced in the title has been frequently held by this court. See *Marston v. Humes*, 3 Wash. 267 (28 Pac. 520); *In re Rafferty*, 1 Wash. 382 (25 Pac. 465). And such we believe to be the tendency of the decisions of all of the courts. But it will not do to sustain legislation which is so foreign to the subject matter embraced in the title that one could read such title without having his attention in any manner directed toward the legislation attempted to be embraced thereunder. A title may be as broad as the legislature sees fit to make it, and thereunder any specific legislation, as to any subject relating to the general matter thus broadly embraced in the title, sustained. But when it sees fit to adopt a restricted title and thereunder attempts to enact provisions not fairly within such restricted title, such provisions cannot be given force by reason of the fact that it would have been competent for the legislature to have adopted a more generic title and thereunder properly included all of the provisions of the act.

The object of such constitutional provisions is twofold; first, to prevent log-rolling legislation; and second, to require such a title that one reading it would have his attention directed to every subject matter in the act. Having this latter object in view, was the title of the act in question sufficient to authorize the enactment thereunder of the provision which was the foundation of this tax levy? Would one reading the title of the act which simply provided for the organization of irrigation districts have his mind at all directed to the question of validating an indebtedness which such district had in the past sought to incur? It seems to us not. A provision for the incurring of

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Syllabus.

an indebtedness in the future might be reasonably expected to be found among the provisions for the organization of such districts; but the validation of past indebtedness, or the fact that such past indebtedness existed, would have no reasonable or natural connection with the organization of such districts.

The contention that this provision is so far outside of the subject matter of the title as to be void under the section of the constitution referred to must be sustained, and there being nothing left to sustain the attempted levy, the decree of the superior court enjoining its collection must be affirmed.

SCOTT, ANDERS, DUNBAR and GORDON, JJ., concur.

[No. 2231. Decided November 12, 1896.]

JOHN F. CLERF, *Respondent*, v. J. M. MONTGOMERY *et al.*, *Appellants*.

FRAUDULENT CONVEYANCE — BONA FIDE PURCHASER.

The filing of a writ of attachment against the husband will not affect the rights of a subsequent purchaser from the wife of lands standing in her name, although such lands may have theretofore been conveyed by the husband to the wife in fraud of creditors, when such subsequent purchaser has no knowledge of the fraud, and no actual notice that the attachment lien was sought to be impressed upon the lands in the wife's name. (Hoyt, C. J., dissents.)

Appeal from Superior Court, Kittitas County. —
HON. CARROLL B. GRAVES, Judge. Reversed.

Ralph Kauffman, and *Edward Pruyn*, for appellants.

Frank H. Rudkin, *A. Mires*, and *D. H. Carey*, for respondent.

15 483
16 682
16 698

The opinion of the court was delivered by

DUNBAR, J.—This is an action brought by the plaintiff and respondent Clerf, as a judgment creditor of defendant J. M. Montgomery, to set aside as fraudulent a recorded conveyance of lands made by said defendant to his wife and co-defendant, S. F. Montgomery, and to have the plaintiff's judgment declared a lien upon the lands included in the conveyance.

Subsequent to contracting the debt upon which judgment was obtained by respondent Clerf, J. M. Montgomery deeded the land in controversy to his wife, S. F. Montgomery. Sometime in November, 1894, plaintiff Clerf commenced an action against J. M. Montgomery. On February 25, 1895, the sheriff levied upon the lands in question by filing a copy of the writ and notice of the attachment in the county auditor's office. On March 22, 1895, defendant S. F. Montgomery, in whose name the title to the lands had been since September 15, 1891, sold to defendant Christianson eighty acres thereof, for which he paid \$1,200, and delivered the deed therefor. It is not claimed in the briefs of either counsel that Christianson had any actual notice of the purported attachment, although something of the kind appears in the testimony in the case; but no finding on that question was made by the court, and we will not discuss it here. It is conceded that Christianson made no examination of the record. On March 27, five days after the deed from S. F. Montgomery to Christianson, the plaintiff took judgment in the attachment suit against J. M. Montgomery. The court found that the conveyance from Montgomery to his wife was made with intent to defraud the grantor's creditors; that the lodging of the writ and notice of attachment with the sheriff in the auditor's office created a valid

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lien upon the whole tract described therein; that the record imparted to Christianson full knowledge of the attachment lien. The conclusions flowing from these findings were that the conveyance from Montgomery to his wife should be set aside; that the judgment obtained by plaintiff against J. M. Montgomery should be declared a lien upon the lands described in the complaint, superior to the right of any of the defendants therein, and the decree was accordingly entered. The exceptions made to the findings of fact and conclusions of law by the appellant Christianson were sufficient to entitle him to a review by this court of the errors alleged.

Without specially reviewing the other assignments, we are satisfied that no error was committed by the court excepting in its finding that Christianson took the lands subject to the lien of the attachment. Christianson, we think, was a *bona fide* purchaser without notice of any incumbrance. The record title was in S. F. Montgomery, and the fact that the copy of the attachment writ, together with a description of the property attached, was filed in the county auditor's office where such writ of attachment ran against the property of J. M. Montgomery, the order being to attach the interest of J. M. Montgomery only, could in nowise, it seems to us, be notice to a purchaser of the attachment of property the record title of which was in the name of another, even though that other should be the wife of J. M. Montgomery. In deraigning title to the land which he purchased, Christianson would be called upon by the law to examine only any liens which might appear of record against J. M. Montgomery; the grantor of his grantor prior to the time when the title passed from said Montgomery. He had no interest in the property of J. M. Mont-

gomery after that date, or in any liens which might be filed against the property of J. M. Montgomery.

It is insisted by the respondent that, even though the levy did not give constructive notice, still the respondent, having done all the law required of him to protect his lien, will be protected even though the appellant Christianson would suffer, for in that event, the law not having provided sufficient safeguards for the protection of purchasers, the common law rule would prevail, and the purchaser would take the property subject to all burdens known and unknown. We do not think this position is tenable. The law provides, through our recording statutes, for constructive notice, and it would have been easy for the attaching creditor in this case to have given notice to the world of the attachment of the property of Mrs. Montgomery. Not having done so, the rights of an innocent purchaser should not be destroyed in his interest.

We are not inclined to find any fault with the finding of the court, so far as the rights of the other appellants are concerned, but for this error the judgment will be reversed and the cause remanded with instructions to modify the judgment so that the decree shall not apply to the lands purchased by the appellant Christianson.

SCOTT and ANDERS, JJ., concur.

HOYT, C. J. (*dissenting*).—I am unable to concur in the foregoing opinion. The property in the name of the wife was *prima facie* that of the community, and one dealing with it as her separate property must do so at his peril; and if he relied upon the deed from the husband to the wife to establish the fact that it was her separate property, he took the risk of the deed being such as to have that effect. But the deed

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having been made to defraud creditors did not have the effect as against them of making the property therein described the separate property of the wife.

[No 2356. Decided November 12, 1896.]

THE WASHINGTON BANK OF WALLA WALLA, *Respondent*, v. FIDELITY ABSTRACT AND SECURITY COMPANY, *Appellant*.

EXECUTION — PROPERTY SUBJECT — ABSTRACT BOOKS — ESTOPPEL.

Under Code Proc., §479, providing that "all property, real and personal, of the judgment debtor, not exempt by law, shall be liable to execution," a set of abstract books are subject to sale on execution.

The owner of abstract records who so far treats them as valuable property as to secure a loan by the execution of a chattel mortgage thereon, is estopped from setting up as a defense to foreclosure proceedings that the records would be of no value in the hands of any but the compiler.

Appeal from Superior Court, Walla Walla County.—
Hon. WILLIAM H. UPTON, Judge. Affirmed.

Thomas & Dovell, for appellant.

Thomas H. Brents, and *Wellington Clark*, for respondent.

The opinion of the court was delivered by

DUNBAR, J.—The appellant corporation by its secretary, S. E. Dean, applied to the respondent, a corporation, for a loan of \$2,000, offering as security a chattel mortgage on a set of abstract records, maps and indices of lands in Walla Walla county. The particular description was as follows:

“The abstract records of all lands in Walla Walla County, State of Washington, and all maps, plats and indices thereunto belonging, or in any wise appertaining now in the office of said mortgagor.”

The loan was made, appellant made default in payment and respondent brought suit to foreclose the mortgage. The defendant answered, setting up as an affirmative defense that the property described in the mortgage was a copy of the financial records of Walla Walla county, arranged in a certain and peculiar manner by appellant, together with certain peculiar indices to said records made and arranged by appellant; that without a knowledge of the arrangement of said copies and said indices the said property was of no value whatever; that the property described was the product of the work and mind of the said Dean, secretary, and of no other, and that the same were made and arranged for the use of said corporation, and none of the property was of any value whatever unless the party having possession thereof had the right to publish and copy the same. The cause was referred to a referee, and after trial the referee returned a report recommending the decree as asked in the complaint

The defendant below excepted and asked the court to make finding in accordance with the answer just above quoted. Only one question is brought to the attention of this court, namely, the contention that on account of the peculiar nature of the property described in the mortgage, the court erred in decreeing its sale. The appellant relies on the case of *Dart v. Woodhouse*, 40 Mich. 399 (29 Am. Rep. 544). This case holds that a set of abstract books, such as those in suit, is but the unpublished manuscript of an author, valuable only on account of its literary con-

tents, and belongs to the class of unleviable property, such as a patent right or a copyright, which are held by most of the courts to be unassignable privileges, or incorporeal and intangible rights.

We cannot indorse the conclusion or the reasoning of the case just cited. It seems to us that these abstract books were not so intangible or incorporeal that they could not be the subject of levy or of sale, and such was the holding in *Leon Loan and Abstract Co. v. Equalization Board*, 86 Iowa, 127 (41 Am. St. Rep. 486, 53 N. W. 94), where the case of *Dart v. Woodhouse*, *supra*, was reviewed. That case was also unfavorably commented upon by Freeman on Executions (2d ed.), § 110, where the author, in reviewing the case, says:

"In a set of abstract books, or in any other manuscripts, we see nothing intangible, nothing which makes it difficult or improper to subject them to execution. Confessedly they are property, and as such may be valuable to their compiler or owner, and doubtless he may by his voluntary transfer divest himself of title, and vest it in another. His transfer may not divest him of the information contained in them, and certainly will not impair the skill required in their compilation or use. The fact that he does not and cannot transfer his information and skill constitutes no ground for denying his ability to transfer so much as is transferable. In a state whose statutes in general terms declare all property subject to execution, we can perceive no reason for holding abstract books or other valuable writings not subject to executions."

It will be observed in this connection that § 479, Code Proc., provides that—

"All property, real and personal, of the judgment debtor, not exempt by law, shall be liable to execution."

This was also the view taken by this court in *Booth & Hanford Abstract Co. v. Phelps*, 8 Wash. 549 (40 Am. St. Rep. 921, 36 Pac. 490), where it was said:

"There is a conflict in the authorities as to whether abstract books are subject to taxation. We think the better rule is that they are subject thereto;"

citing *Leon Loan and Abstract Co. v. Equalization Board*, *supra*.

Many of the cases are cases where the question arose on the right to tax such property, but in this case a more rigid rule should be adopted against the claim of appellant. By his own contract he treated these abstract books as property of value, and obtained a valuable consideration for them in the nature of a loan, and it would be unconscionable to allow him to plead their worthlessness in a court of equity.

The judgment will be affirmed.

HOYT, C. J., and SCOTT, ANDERS and GORDON, JJ., concur.

[No 2376. Decided November 12, 1896.]

IGNATIUS COLVIN, *Appellant*, v. EMMA E. COLVIN, *Respondent*.

DIVORCE—INABILITY TO LIVE PEACEABLY TOGETHER—ALLOWANCE OF ATTORNEY FEES.

Code Proc., § 764, subd. 7, providing that "a divorce may be granted upon application of either party for any other cause deemed by the court sufficient, and the court shall be satisfied that the parties can no longer live together," lodges a discretionary power in the court which must be exercised in a sound and legal manner so as to conduce to domestic harmony and the peace and morality of society.

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A court is warranted in refusing a divorce, although finding that the parties cannot live peaceably together, when such failure is due to their own obstinacy and stubbornness, and both parties are equally in fault. (DUNBAR and SCOTT, JJ., dissent.)

The allowance by the court of \$300 as counsel fees to the wife, in refusing the husband's petition for divorce, is not an abuse of the discretion reposed in the court in such matters, even though it may appear that a division of property had been made between the parties and that the wife was amply able to bear the expenses attending the action.

Appeal from Superior Court, Thurston County.—
Hon. T. M. REED, JR., Judge. Affirmed.

John R. Mitchell, for appellant.

John C. Kleber, and *A. E. Rice*, for respondent.

The opinion of the court was delivered by

GORDON, J.—The appellant (plaintiff below) brought this action to secure a divorce. His complaint in substance charges the respondent with continual, habitual unkindness, and that she is irreconcilably opposed to plaintiff's will, wishes, welfare, business and interests, and that it is not possible for the plaintiff to longer live with the defendant.

The answer, after denying the material allegations of the complaint, contains an affirmative defense, setting up specific acts of cruelty by the plaintiff. At the trial of the cause, after appellant rested, respondent moved for a dismissal upon the ground that the testimony on the part of the plaintiff failed to show a *prima facie* case for the relief prayed. This motion was granted, findings of fact made and judgment entered in favor of the respondent, dismissing the cause, awarding costs to the respondent, and \$300 as counsel fee. The appeal is from such judgment.

The appellant is sixty-six and the respondent fifty-five years of age. They were married in Thurston

county in the year 1866, and from that time until about the 15th of December, 1895, continued to live together as husband and wife. As issue of such marriage there are four children ranging in age from seventeen to twenty-six years. During their marriage they have accumulated property to the value of some twenty-five or thirty thousand dollars, and in addition to the property so accumulated, the appellant is the owner in his own right of considerable property, which was acquired by him prior to his marriage with the respondent. Pursuant to an agreement between the parties, their property was divided through the instrumentality of arbitrators chosen by them in the fall of the year 1895, and since such division the parties have lived separate and apart. For a number of years appellant has been afflicted with a cancerous affection of the upper lip and mouth, from which he continuously suffers more or less pain, and doubtless much of his irritability of temper is due to this disease.

Among other things the lower court found

“ 6. That for about four years last past there have been occasional quarrels and misunderstandings between plaintiff and defendant, and for about sixteen months last past there has resulted from such misunderstandings and disagreements a complete estrangement between plaintiff and defendant.

7. That such estrangement is so great that the parties cannot henceforth peaceably live together.

8. That such quarrels, misunderstandings and disagreements occurring aforesaid, were not occasioned wholly by the fault or misconduct of the defendant, but that the plaintiff was equally in fault in regard thereto.”

The main contention of the appellant is that his case is strong enough to invoke the discretionary

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power conferred by subdivision 7 of § 764, Code Proc. (2d Hill), which provides

“And a divorce may be granted upon application of either party for any other cause deemed by the court sufficient, and the court shall be satisfied that the parties can no longer live together.”

There was no proof that the appellant had sustained any mental or physical injury, or suffered any personal indignities at the hands of the respondent, or that he lived in a state of danger or apprehension of violence, nor does the complaint charge any specific acts of cruelty on the part of the respondent, but it is insisted that the evidence does not justify the finding of the court that the “quarrels, misunderstandings and disagreements occurring aforesaid, were not occasioned wholly by the fault or misconduct of the defendant, but that the plaintiff was equally in fault in regard thereto.” It appears from the evidence that appellant had posted notices upon the farm, whereon he has resided since their property was divided, forbidding the respondent to go upon his land. Also, that he had made it a condition in a lease that the lessee should not permit respondent to go upon the demised premises. It further appears that while there were numerous wordy disputes and disagreements between the parties, no personal violence was ever offered or threatened by either of them toward the other.

Examined as a witness in his own behalf appellant said:

“We couldn’t agree about certain things for the last year or two . . . get to disputing over some trivial matter . . . just like two can’t agree, you know, get to talking over things, get to quarreling about one thing and another; sometimes she would get up and leave; sometimes I did, so we finally quit entirely.”

He frankly admitted that the measure of his blame was as great as that of the respondent, and, indeed, we think that this conclusion is justified by the entire evidence. The testimony of one of the daughters was that both parties were at fault.

Thomas Ismay was one of appellant's witnesses. It appears that he was one of the arbitrators selected by the parties to effect a division of their property. On cross-examination he was asked:

"*Question.* Now, you stated on direct examination that you thought the parties might still live together. I will ask you, in making the division and the time you spent where they both were, what the general treatment that he received at her hands was? *Answer.* Well, so far as I saw any treatment it was all right; me being a stranger and not being a party interested I should not have thought there was any grievance in the family; I think I made two or three suggestions, that they were sparking again."

But it is urged that, inasmuch as the court found "that the parties can not henceforth peaceably live together," a case is made under the discretionary power lodged in the court by virtue of subdivision 7, § 764, 2d Hill, *supra*. Under a similar provision in the code of Indiana it has been held that this discretionary power must be exercised in a sound and legal manner so as to conduce to domestic harmony, and the peace and morality of society, and that the action of the lower court in such cases is subject to revision. *Ritter v. Ritter*, 5 Blackf. 81; *Ruby v. Ruby*, 29 Ind. 174.

We do not think it was intended by the legislature that a divorce should be granted in every case wherein it should be found "that the parties can no longer live together," and where, as here, their failure to live together is due to their own obstinacy and stubbornness, we think a divorce should be denied. It is not the

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policy of the law that divorces should be granted merely because parties "from unruly temper" or mutual wranglings live unhappily together. In order to have relief, it is not required that the party complaining should be wholly without fault, for the law recognizes the weakness of human nature, and measures the conduct of the parties by the standard of common experience. But where the parties to a divorce suit are *in pari delicto*, the conduct of each being a constant aggravation to further offense by the other, no divorce will be granted at the instance of either party. *Cate v. Cate*, 53 Ark. 486 (14 S. W. 675).

We think the rule, applicable to the present case, is well stated by Chief Justice COCKRILL, in the case of *Cate v. Cate*, *supra*, as follows :

"Unhappiness sufficient to render the condition of both parties intolerable may arise from the mutual neglect of the conjugal duties; but when the parties are thus at fault, the remedy must be sought by them, not in the courts, but in the reformation of their conduct. The remedy is *in their own hands*, and until it has been tried without effect by the party complaining, the courts will not give effect to the complaint. Until this home remedy has been tested and failed, the condition of each may be said to be due to his or her own acts, and one must bear the consequences of his own misconduct."

See, also, *Cooper v. Cooper*, 17 Mich. 210 (97 Am. Dec. 182); *Morrison v. Morrison*, 64 Mich. 53 (30 N. W. 903).

In the case last cited the court say :

"Where both are to blame neither should be granted a divorce. . . . The marriage relation should not be considered as a garment to be worn or cast aside at pleasure."

The proof shows the appellant to be a man of rough

but kindly nature, who received few advantages in early life. For upwards of a quarter of a century he and the respondent lived together peaceably and happily amidst the discouragements and privations of their pioneer home. Their plans worked well, and as a result of their joint industry and good judgment they find themselves in easy circumstances and comparatively rich. In the light of these circumstances and of the entire record, we are unwilling to believe that these parties, who have endured so much for each other and for their children, cannot, if they will, continue to live together happily. To do so involves the making of mutual concessions and sacrifices, but these they should cheerfully make for their own happiness and their children's welfare.

We do not think the allowance of \$300 to the respondent for counsel fees was exorbitant under the circumstances of the case. At least, we are not satisfied that in allowing that sum the court abused its discretion.

Upon consideration of the entire record the judgment is affirmed.

HOYT, C. J., and ANDERS, J., concur.

DUNBAR, J. (*dissenting*).—I am satisfied that the parties cannot, and ought not to live together, and I think the plaintiff showed good cause for a divorce. I therefore respectfully dissent from the conclusion reached by the majority.

SCOTT, J., concurs in dissenting opinion.

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Opinion of the Court—Scott, J.

[No. 2199. Decided November 13, 1896.]

JULIA A. UNDERWOOD, *Respondent*, v. J. F. STACK *et ux.*, *Appellants*.

STATUTE OF FRAUDS—SALE OF LANDS—ACTION FOR DAMAGES—
JUDGMENT WITHOUT VERDICT.

An agreement made by husband and wife with a vendor, through the medium of letters and telegrams, whereby they agree to take certain land, directing that the deed be made to the wife, and the deed was made accordingly and possession of the premises taken by the wife, is sufficient to show a valid contract of purchase as against the statute of frauds.

Where there is no conflict in the proofs, the court is authorized in taking the case from the jury and rendering judgment for the amount claimed.

Appeal from Superior Court, Kittitas County.—
Hon. CARROLL B. GRAVES, Judge. Affirmed.

W. S. Smith, for appellants.

Edward Pruyn, and Kirk Whited, for respondent.

The opinion of the court was delivered by

Scott, J.—This was an action to recover damages for the alleged breach of a contract relating to the sale of certain lands by the plaintiff to the defendants. The defendants contend that the court erred in overruling their demurrers to the complaint on the ground that it did not state a cause of action. No particular is pointed out wherein the complaint is defective, except the general statement in their brief that the contract was void. We fail to see wherein it was void, and think that the complaint was sufficient.

Aside from this question the main controversy is over the facts. It is contended that no sufficient contract was proven to support a recovery. The defend-

ants were husband and wife, and letters, relating to the purchase of the land, signed by them were introduced in evidence. There was also introduced a telegram from the husband stating that they would take the land, and in a letter by him thereafter it was directed that the deed should be made to Mrs. Stack, and stated that anything done by her would be satisfactory to him. The deed was executed accordingly, and Mrs. Stack went into possession of the premises. This was sufficient to show a valid contract for the purchase of the lands on the part of the defendants as against the statute of frauds.

A motion for a non-suit was denied. The defendants offered no proof, and the court took the case from the jury and entered a judgment against them for \$1,500. It is contended that this was error and that the matter should have been submitted to the jury to determine the amount; but as the case stood there was no conflict in the proofs, and it was not error, under the circumstances, for the court to render a judgment for said sum.

Affirmed.

HOYT, C. J., and ANDERS, GORDON and DUNBAR, JJ.,
concur.

[No 2329. Decided November 13, 1896.]

THE CITY OF TACOMA, *Appellant*, v. THE TACOMA
LIGHT AND WATER COMPANY, *Respondent*.

MUNICIPAL CORPORATIONS — CONTRACTS — CONSTRUCTION.

Where a municipal ordinance authorizing the purchase of a light and water system limits the property purchased to such as was owned or operated by the company as a part of its water and light plants, the city is not entitled to certain real property which belongs to the light and water company, and is used for other purposes.

Appeal from Superior Court, Pierce County.—Hon.
WILLIAM H. PRITCHARD, Judge. Affirmed.

John Paul Judson, and *W. H. H. Kean* (*James Wick-
ersham*, of counsel), for appellant.

Parsons, Corell & Parsons, and *Crowley, Sullivan &
Grosscup*, for respondent.

The opinion of the court was delivered by

SCOTT, J.—This action was brought to obtain possession of certain real property, which the city claims to have purchased of the Light and Water Company at the time it purchased its electric light plant and waterworks, which were involved in a former case before this court between said parties. 13 Wash. 115 (42 Pac. 533). The decision there rendered seems to us to clearly settle this controversy in favor of the defendant, as found by the lower court. The ordinance, under which the purchase was made and the property in question claimed, was referred to in the case cited and was published in *Seymour v. Tacoma*, 6 Wash. 138 (32 Pac. 1077). Section one of said ordinance limited the property purchased to such as was owned or operated by the defendant as a part of its water and electric

light plants. The property in controversy in this case was not so owned or operated, but was used for an entirely different purpose.

Affirmed.

HOYT, C. J., and ANDERS, GORDON and DUNBAR, JJ.,
concur.

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[No 2423. Decided November 13, 1896.]

THE STATE OF WASHINGTON, *on the Relation of Mary Nolte et al.*, v. SUPERIOR COURT OF KING COUNTY,
J. W. LANGLEY, *Judge*.

GARNISHMENT — BRINGING IN NEW PARTIES — PROCESS — WRIT OF PROHIBITION — COSTS.

The superior court has no authority in a garnishment proceeding to make an order directing that a person not regularly served shall be made a party defendant, although it may appear from the answer or examination of the garnishee that such person is a necessary party.

Upon the issuance of a writ of prohibition restraining action on the part of the superior court, the costs should be taxed against the party in the original action at whose instance the court was proceeding unlawfully.

Original Application for Prohibition.

Condon & Wright, for relators :

The superior court has no jurisdiction to bring in Mary Nolte as a party without service of summons and complaint or other process prescribed by statute. The order of the superior court in effect requires Mrs. Nolte to appear, affirmatively to plead and to assume the burden of proof. Courts can acquire jurisdiction only by proceeding in regular and orderly course in

the manner prescribed by statute. They cannot dispense with the service of process and the filing of pleadings nor can they shift the burden of proof. *State, ex rel. Dodge, v. Langhorne*, 12 Wash. 588; *Brown, Jurisdiction*, §§ 1, 3, 40, 41, and notes.

The nature of the suit before the superior court was not such that the court could have ordered Mrs. Nolte to be made a party against her will even by the service of process otherwise proper in form. *Marx v. Parker*, 9 Wash. 473 (37 Pac. 675, 43 Am. St. Rep. 849); *A. H. King Co. v. Seed*, 25 N. Y. Supp. 1115; *Chapman v. Forbes*, 26 N. E. 3.

Where a lower court has assumed to entertain a cause without jurisdiction or in excess of its jurisdiction and threatens to proceed with the trial of the same in the face of objection made upon the ground of its lack of jurisdiction, a writ of prohibition will issue from this court to prevent it from proceeding further with the cause. *North Yakima v. Superior Court*, 4 Wash. 655; *State, ex rel. Cummings, v. Superior Court*, 5 Wash. 518; *State, ex rel. Dodge, v. Langhorne*, 12 Wash. 588.

Costs should be taxed against Alpheus Byers the plaintiff in the superior court. *State, ex rel. Cummings, v. Superior Court*, 5 Wash. 518.

Ovid A. Byers, for respondent.

The opinion of the court was delivered by

SCOTT, J.—This is an application for a writ of prohibition based upon the following facts: One Byers obtained a judgment in the superior court of King county against one Nolte, and thereafter caused a writ of garnishment to be issued against the Eureka Coal Company. Said company appeared and answered, de-

nying any indebtedness to the principal defendant, but it appeared that it had executed a note payable to him, which, however, was alleged to be the property of his wife, the relator. Thereupon, upon an affidavit and application of the plaintiff, the court issued an order reciting that the relator was a necessary party to said controversy; and further that it was "therefore ordered that said Mary Nolte be and she hereby is made a party defendant hereto, and she is hereby required to file in this court within twenty days from and after the service on her of a copy of this order, together with a copy of the aforesaid affidavit, her answer setting up her claim, if any, to the note and mortgage;" and that otherwise her default would be entered.

The court had no authority to proceed in any other way than the regular one, by the service of the process provided by statute, to make the relator a party, and the writ should issue, with costs against the plaintiff in the original action.

HOYT, C. J., and ANDERS and DUNBAR, JJ., concur.

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Argument of Counsel.

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[No 2247. Decided November 14, 1896.]

ELIZA MAUD HILL, *Appellant*, v. J. D. LOWMAN, *Respondent*.

VACATION OF JUDGMENT—LIMITATION ON ACTION BY MINOR—SUFFICIENCY OF COMPLAINT—JUDGMENT AGAINST EXECUTOR—EFFECT ON DEVISEES.

An action for the vacation of a judgment against a minor is barred if not brought within a year after the arrival of such minor at the age of majority.

A complaint in an action to vacate a judgment of foreclosure is insufficient, when there is no showing that it was not an equitable one, or that the judgment would be different if the cause were retried.

A decree of foreclosure against the executor of an estate is binding on devisees, although not parties to the action.

Appeal from Superior Court, King County.—Hon. RICHARD OSBORN, Judge. Affirmed.

W. F. Hays, for appellant.

Carr & Preston, for respondent:

In an action against an executor to foreclose a mortgage, the devisees of a deceased mortgagor are not necessary parties, and a judgment rendered in such action against the executor concludes the heirs and devisees although not parties to the action. *Hyde v. Heller*, 10 Wash. 586.

It is the settled law of this state that actions in relation to the real estate of an ancestor can only be maintained by the heir or devisee after the close of administration. *Hazelton v. Bogardus*, 8 Wash. 102; *Balch v. Smith*, 4 Wash. 497; *Dunn v. Peterson*, 4 Wash. 170; *Hanford v. Davies*, 1 Wash. 476.

A proceeding to vacate a judgment of the superior

court rendered against a minor, must be brought within twelve months after the day of the minor's majority. Code Proc., § 1393, subd. 8, and § 1395. *Marston v. Humes*, 3 Wash. 267; *Dahms v. Alston*, 34 N. W. 182; *Eisenmenger v. Murphy*, 43 N. W. 784.

If in an action against a minor, process is duly issued and served upon him, the court thereby acquires jurisdiction of his person, and if the court fails to appoint a guardian *ad litem* for him, such failure is an irregularity merely and does not go to the jurisdiction of the court, and the judgment rendered in such action is not void but is voidable only. *Eisenmenger v. Murphy*, *supra*; *Dahms v. Alston*, *supra*; *Hoover v. Kinsey Plow Co.*, 8 N. W. 658; *Drake v. Hanshaw*, 47 Iowa, 291.

A recital in a judgment, findings or decree, of the appointment of a guardian *ad litem* for an infant defendant, is sufficient evidence of a due appointment. *Benjamin v. Birmingham*, 8 S. W. 183; *White v. Morris*, 12 S. E. 80; *Rhoads v. Rhoads*, 43 Ill. 239; *McAnear v. Epperson*, 54 Tex. 220 (38 Am. Rep. 625); *Van Fleet*, Collateral Attack, § 475.

The appellant is not entitled to a vacation upon petition, since she shows she has no defense to the action. Code Proc., §§ 1395-1397; *Hoover v. Kinsey Plow Co.*, *supra*.

The opinion of the court was delivered by

DUNBAR, J.—It is doubtful if there is such an assignment of errors in the brief of the appellant as would warrant the court in entering into an investigation of the cause, but, considering the nature of the case, we will pass over that inadvertence and look at the case upon its merits.

Appellant is the daughter of George D. and Ellen

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K. Hill, both deceased. Before the decease of either Ellen K. or George D. Hill, they borrowed \$15,000 from one Reed, and gave a mortgage to secure it, upon certain real estate described in the record in this case. Ellen K. Hill died testate at Seattle on the 14th day of February, 1887, and the said George D. Hill died testate December 5, 1890. By the will of the said Ellen K. Hill her husband was made her executor, and she bequeathed all of her property to her four children, share and share alike, appellant being the eldest. The mortgage spoken of was executed on the 24th day of March, 1885, due March 24, 1888. On the 28th day of November, 1887, the payee, S. G. Reed, transferred said mortgage to the respondent, J. D. Lowman, and on the 28th day of December, 1887, respondent brought suit to foreclose the mortgage and obtained a decree of foreclosure thereof on the 11th day of February, 1888, prior to the time the appellant was eighteen years old, but after she was fourteen years old. The note for which the mortgage was given as security provided that the amount of money borrowed should be paid three years after the date thereof, with interest after date thereof until paid, payable quarter yearly. In the mortgage the note was set out verbatim, but instead of saying "with interest after date until paid," the copy set out in the mortgage reads, "with interest after maturity until paid." The mortgage provided that the whole principal sum evidenced by the note should become due and the mortgage might be foreclosed for the whole sum upon default being made in the payment of any interest installment. The interest upon the note was paid quarter yearly up to the 24th day of December, 1886, but no installment of interest falling due thereon at any time thereafter was ever paid.

This action was brought by the appellant, Eliza Maud Hill, to vacate the judgment rendered in the foreclosure proceeding, and for a decree to the appellant of such portion of the mortgaged premises as she was entitled to. The court below found that there was no equity in the petition of plaintiff in this action; that she had no interest in the property affected by the decree in the former suit of foreclosure, sufficient to entitle her to maintain this action, and that the defendant was entitled to a decree upon the facts found; dismissed the action and entered judgment against the plaintiff for costs.

We are not able to find any merit in this appeal. If it is considered as an action for the vacation of the judgment it is barred by the statute of limitations, more than a year having expired since the arrival of the appellant at the age of majority. Again, there is no equitable showing made by appellant—really no allegation in the complaint—that the decree was not an equitable one, and that the judgment would be any different if it were vacated and the cause re-tried. It is contended by the appellant that she is not bound by the decree of foreclosure from the fact that she was not a party to the foreclosure suit. Even if this were true, it is not disputed that the executor was made a party to the foreclosure of the mortgage, and, under the decision of this court in *Hyde v. Heller*, 10 Wash. 586 (39 Pac. 249), that would be sufficient to give the court jurisdiction. Again, the court finds as a fact in this case that the appellant was made a party to the foreclosure suit by service upon her guardian *ad litem*. This finding was not excepted to by the appellant, and must stand as the established fact in this case. In fact, no exceptions were made to either the findings of fact or conclusions of law made by the

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lower court, and as the findings of fact, we think, without any question warrant the conclusions of law, and the conclusions warrant the judgment rendered, said judgment must be affirmed.

HOYT, C. J., and SCOTT, ANDERS and GORDON, JJ.,
concur.

[No. 2257. Decided November 14, 1896.]

PORT TOWNSEND SOUTHERN RAILROAD COMPANY, Ap-
pellant, v. ALLEN WEIR, Respondent.

ACTION ON PROMISSORY NOTE — SUFFICIENCY OF ANSWER — FAILURE OF
CONSIDERATION — SUFFICIENCY OF EVIDENCE.

In an action upon a promissory note, plaintiff is not entitled to judgment on the pleadings when the answer admits the execution of the note but alleges a failure of consideration, and also that the defendant's signature was obtained by fraud.

In a suit upon a promissory note for \$250 given by defendant to plaintiff as part of a subsidy for the construction of a railroad from the city of Port Townsend to connect with a transcontinental line of railway, in accordance with a bond for \$1,000 conditioned that, if twenty miles of road were completed by a certain date, \$250 should become due and the balance upon the completion of the road as a whole, a verdict for defendant will not be disturbed when no more than the first twenty miles had been constructed and the issue submitted to the jury was as to whether or not the note in suit was to cover a portion of the second installment instead of the first, as it must be presumed from their verdict that they found the note was given as a part of the second installment, for which there was admittedly no consideration.

Appeal from Superior Court, Thurston County.—
Hon. T. M. REED, JR., Judge. Affirmed.

S. H. Piles, and *J. E. Lilly*, for appellant.

M. A. Root, and *Allen Weir*, for respondent.

The opinion of the court was delivered by

SCOTT, J.—This action was brought upon a promissory note for \$250, executed by the defendant to plaintiff, From a verdict and judgment for defendant the plaintiff has appealed.

The first error complained of is the denial of a motion for judgment on the pleadings; but as the answer alleged a failure of consideration, and further that the defendant's signature to the note was obtained by fraud, this motion was properly denied.

It is next contended that the court erred in admitting evidence of fraud, but the record shows that the plaintiff's objection to this testimony was sustained.

Another contention is that there was no evidence to support the verdict. It appeared that the defendant had executed to the plaintiff his bond in the sum of \$1,000, conditioned in substance that if the plaintiff should, on or before September, 1890, complete and operate a line of railroad for a distance of twenty miles southerly from a point in the city of Port Townsend, one-fourth of said sum should then become due and payable; and that the remainder of it should become due and payable upon the completion of such railroad to a point connecting Port Townsend with a transcontinental railroad; and it was admitted by a stipulation that the note was executed pursuant to the stipulations of such bond. It was admitted also that the first twenty miles of road had been completed, and the conditions of the bond in that respect complied with. But the issue was as to whether, as claimed by the plaintiff, the note had been given for the first installment provided for by the bond, or whether, as claimed by the defendant, it was given to represent a portion of the second installment. This question was submitted to the jury under proper instructions by the

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Opinion of the Court—SCOTT, J.

court, and the jury having rendered a verdict for the defendant must be presumed to have found that it was given as a part of the second installment. As to this, it was conceded that the terms of the bond had not been complied with by the plaintiff and that the consideration had wholly failed. We think this was competent proof to sustain the verdict rendered.

It is lastly complained that the court erred in denying a motion for a new trial, but we find nothing in the proofs submitted which would warrant us in holding that the discretion of the court was abused in this particular, and the judgment is affirmed.

HOYT, C. J., and ANDERS, GORDON and DUNBAR, JJ., concur.

[No 2274. Decided November 14, 1896.]

THE STATE OF WASHINGTON, *Respondent*, v. WILLIAM S. GLEASON, *Appellant*.

MUNICIPAL COURTS—JURISDICTION—ASSAULT AND BATTERY.

The constitutional provision requiring all offences theretofore prosecuted by indictment to be thereafter prosecuted by information or indictment does not require an information or indictment against one charged with assault and battery in a municipal court or that of a justice of the peace, since the offence was within the jurisdiction of a justice of the peace before the adoption of the constitution.

Appeal from Superior Court, Spokane County.—
Hon. NORMAN BUCK, Judge. Affirmed.

L. H. Prather, for appellant.

J. W. Feighan, Prosecuting Attorney, for The State.

The opinion of the court was delivered by.

SCOTT, J.—The defendant was tried upon an ordi-

nary complaint, in substance such as is used before a justice of the peace, in the municipal court of the city of Spokane, and convicted of the crime of assault and battery, and was fined in the sum of \$500. From this judgment he appealed to the superior court, and therein moved to quash all the proceedings and for his discharge, because the court had no jurisdiction to try him without an information or indictment first having been found or presented against him. This motion was denied and he was again tried and convicted; from which judgment he has appealed.

It is contended that the constitution, art. 1, § 25, which provides that all offences theretofore prosecuted by indictment might thereafter be prosecuted by information or indictment, as might be prescribed by law, would require an information in this case as prior to the constitution all offences except those within the jurisdiction of a justice of the peace had to be prosecuted by indictment, and that the jurisdiction of the municipal court in this case to proceed without it was no greater than that of a justice of the peace, and that when the municipal judge concluded that a fine of \$100 was not a sufficient punishment, it was his duty to bind the defendant over to the superior court unless the municipal court could proceed by indictment or information.

Conceding for the purposes of this case that the question was properly raised, we do not think the contention is well founded. At the time the constitution was adopted justices of the peace had concurrent jurisdiction with the district courts in prosecutions for assault and battery, and hence this offence was not necessarily an offence "theretofore prosecuted by indictment." A justice of the peace had jurisdiction to try a defendant for this offence before the adoption of

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the constitution, and impose a fine up to the statutory limit. The nature of the offence was not changed by the constitution. The constitution authorized the creation of the municipal court and authorized the legislature to prescribe its jurisdiction and powers. The legislature, by merely increasing the limit within which a fine might be imposed did not change the nature of the offence, nor require it to be prosecuted by indictment or information in the municipal court, or in the superior court upon an appeal.

Affirmed.

HOYT, C. J., and ANDERS and DUNBAR, JJ., concur.

[No. 2277. Decided November 14' 1896.]

THOMAS WATTERSON *et al.*, Respondents, v. C. P. MASTERSON *et al.*, Appellants.

APPEAL — NOTICE — BANKS — ENFORCEMENT OF STOCKHOLDERS' LIABILITY — RECEIVERS.

The fact that notice of appeal has been given but not served on all who had appeared in the action, will not preclude the parties not served from themselves giving notice of appeal and serving same upon all necessary parties; and, in such case, there is nothing objectionable in the abandonment of the first appeal, by those attempting it, and a joinder by them in the second one.

The fact that a banking corporation is insolvent and in the hands of a receiver will not entitle creditors to proceed against its stockholders upon their secondary liability, but such liability constitutes a part of the receiver's trust fund, which the court is authorized to direct him to enforce for the benefit of all the creditors. (*Wilson v. Book*, 13 Wash. 676, followed.)

The fact that an action by creditors against the stockholders of an insolvent bank includes the receiver of the bank as a party, will not entitle the creditors to enforce the contingent liability of the stockholders by a direct proceeding against them.

15	511
24	383
24	624
15	511
136	298
36	649

Appeal from Superior Court, Pierce County.—Hon. W. H. PRITCHARD, Judge. Reversed.

Remington & Reynolds, and *John Paul Judson*, for appellant:

The complaint in this case shows upon its face, it was conceded throughout the trial, and the evidence conclusively showed, that there were assets of the insolvent bank then in the hands of the receiver and available to the creditors. Upon the authority of *Wilson v. Book*, 13 Wash. 676, we submit that the demurrer should have been sustained and the action dismissed. In addition to the authorities cited in the opinion in that case, we might add: *Stewart v. Lay*, 45 Iowa, 604; Appeal of Means, 85 Pa. St. 75; *McClaren v. Franciscus*, 43 Mo. 452; *Wright v. McCormack*, 17 Ohio St. 87; *Harper v. Union Manufacturing Co.*, 100 Ill. 225; *Grew v. Breed*, 10 Metc. (Mass.) 569 (46 Am. Dec. 687).

John A. Shank, and *Walter M. Harvey* (*Herbert S. Griggs*, of counsel), for respondents:

The appointment of a receiver would not affect the right of the creditors to enforce liability by proceeding against the shareholders directly. 2 Morawetz, Corporations, 842; Cook, Stock & Stockholders, § 219; 23 Am. & Eng. Enc. Law, pp. 884-887, and authorities there cited; *Morgan v. Lewis*, 17 N. E. 558; *Hodgson v. Cheever*, 8 Mo. App. 318; *State Savings Bank v. Kellogg*, 52 Mo. 583; *McDougald v. Lane*, 18 Ga. 444; *Lane v. Morris*, 8 Ga. 468; *Brobston v. Downing*, 22 S. E. 277; *Paine v. Stewart*, 33 Conn. 517; *Bank of Poughkeepsie v. Ibbotson*, 24 Wend. 479; *Perkins v. Church*, 31 Barb. 84; *Briggs v. Penniman*, 8 Cow. 391 (18 Am.

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Dec. 454); *Kincaid v. Dwinelle*, 59 N. Y. 551; *Spence v. Shapard*, 57 Ala. 598.

The opinion of the court was delivered by

HOYT, C. J.—A portion of the defendants in this action gave notice of appeal, but did not serve it upon all who had appeared in the action. Thereafter the defendants not served with notice themselves gave notice and served it upon all necessary parties. Respondents moved to dismiss both appeals; the first for the reason that the required parties had not been served, and the second because it was taken while the first was pending and undisposed of.

It was clearly the right of the defendants not served with notice of the first appeal to give notice in their own behalf; hence their appeal was regularly taken; and this being so, those who attempted the first appeal could abandon it and join in the second one. By their doing so the duplication of papers was prevented, and the whole matter of the prosecution of the appeal simplified, and at the same time every object which the requirements of the statute had in view was fully accomplished.

The motion to dismiss must be denied.

The Bank of Puyallup had failed and a receiver of its assets had been duly appointed by the superior court of Pierce county. Thereafter this action was brought by a creditor of the bank against its stockholders to recover in his own interest and that of all other creditors the contingent liability of the stockholders under the provisions of the constitution of this state. The receiver was made a party to the action. Other creditors intervened and the action resulted in a judgment against the stockholders respectively for their share of the liability growing out

of the claims of all the creditors which were established in the action. From this judgment this appeal has been prosecuted.

The principal questions involved in this case were decided in *Wilson v. Book*, 13 Wash. 676 (43 Pac. 939), and it is conceded that under the rule therein announced the judgment cannot stand; but respondents earnestly contend that the decision in that case was against the great weight of authority, and ask that the questions therein decided be again examined. This has been done, but such re-examination has resulted in the confirmation of the views expressed in the opinion filed in that case. If any proof had been needed that the method pointed out in that opinion for enforcing the contingent liability of stockholders was demanded by public policy and was in the interest of all classes interested in the bank, such proof is furnished by the record in this case. After great expense and the waste of much time for the purpose of establishing the facts necessary to authorize the enforcement of the liability in behalf of creditors against the stockholders, such creditors were in no better situation than the receiver was before they had commenced this proceeding. Hence, it was the duty of the courts to interpret our constitutional provision so as to make the enforcement of this contingent liability a part of the duties of the general receiver, if the language used would authorize such a construction. We thought then, and still think, that such a construction is reasonable. It is true that the courts of many states have interpreted somewhat similar constitutional provisions to authorize the creditors to proceed directly against the stockholders, but in most, if not all, of these states their constitutional or statutory provisions were so different from ours that the

cases are entitled to but little consideration. For that reason we thought it our duty to interpret our constitutional provision so as to best protect the interests of all concerned, so far as the language used would warrant such construction. We are satisfied with the conclusion upon this question to which we arrived in the case above referred to, and must adhere thereto.

The only reason suggested why this case is not governed by that one is that in that case the general receiver was not made a party to the action against the stockholders, while in this one he was. But we are unable to see how this fact could in any manner affect the right of the creditors to maintain an independent action.

The judgment will be reversed and the proceeding dismissed.

DUNBAR, SCOTT, ANDERS and GORDON, JJ., concur.

[No. 2354. Decided November 14, 1896.]

THE CITY OF TACOMA, *Respondent*, v. COMMERCIAL
ELECTRIC LIGHT AND POWER COMPANY, *Appellant*.

PLEA IN ABATEMENT — ANOTHER ACTION PENDING.

Where an electric light company has secured a restraining order prohibiting a city from interfering with it while stretching certain wires, which had been torn down the night before by the city officials, a subsequent action by the city seeking to restrain the company from replacing its wires involves identical issues and is subject to a plea in abatement.

Appeal from Superior Court, Pierce County.— Hon.
JOHN C. STALLCUP, Judge. Reversed.

Stiles & Stevens, for appellant.

John Paul Judson, and *W. H. H. Kean*, for respondent.

The opinion of the court was delivered by

DUNBAR, J.— Careful and elaborate briefs have been prepared by both appellant and respondent on the merits of this case, but there is a question lying at the threshold which renders it unnecessary for us to discuss the merits. A plea in abatement was made by the appellant and the court was asked to vacate the restraining order and dismiss this action by reason of the pendency of another case involving the same questions.

The appellant had commenced in the superior court of Pierce county before Judge PRITCHARD, superior judge, injunctive proceedings against the respondent in this case, and a restraining order had been granted by Judge PRITCHARD prohibiting the city of Tacoma, the respondent here, from interfering with the Commercial Electric Light and Power Company, appellant here, stretching certain wires which had been torn down the night before by the city officials. The restraining order obtained by the appellant had been served upon the respondent together with the summons and complaint in the action, and a few hours after such service the present action was commenced by the respondent seeking to restrain appellant from proceeding to replace its wires. The second restraining order, the present one, was brought in the superior court before Judge STALLCUP, superior judge of Pierce county.

The pleadings show conclusively that the real issues in the two cases are identical and the motion to vacate and dismiss ought to have been, upon the showing

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made, at once granted by the judge. Every issue involved in this action could have been litigated in the prior action which was plead in abatement; even the question of nuisance would have been a defense which the defendant in the first action could have pleaded. Without specially reviewing the pleadings in the respective cases, it is too plain for argument that the substantive issues in the two cases are identical, and the only result of entertaining jurisdiction in the last case was to interfere with and annul the action of the judge who issued the first restraining order. Such a practice is wrong in theory and is liable to be pernicious in effect.

The judgment will be reversed and the cause remanded with instructions to the lower court to vacate the restraining order and dismiss the action.

HOYT, C. J., and ANDERS, GORDON and SCOTT, JJ.,
concur.

[No. 2218. Decided November 16, 1896.]

JOHN W. KLEEB, *Appellant* v. BENJAMIN FRAZER *et al.*,
Respondents.

FRAUD — SUFFICIENCY OF EVIDENCE.

When fraud is alleged it must have more conclusive proof to warrant the entry of a judgment than mere inferences springing from one or two suspicious circumstances, especially when these had transpired so long before the trial as to make the incidents connected with them difficult of proof.

Appeal from Superior Court, Pierce County.—Hon.
W. H. PRITCHARD, Judge. Affirmed.

Parsons, Corell & Parsons, for appellant.

O'Brien & Robertson, for respondents.

The opinion of the court was delivered by

DUNBAR, J.—This action was brought to set aside and annul an alleged fraudulent deed and bill of sale, made by the defendant Benjamin Frazer to his brother Henry Frazer, respondents in this case. The appellant relies upon the judgment in this court in *O'Leary v. Duvall*, 10 Wash. 666 (39 Pac. 163); but a careful review of all the testimony in this case convinces us that the rule applied in that case is not applicable to this. While it is true that fraud is hard to prove yet it is equally true that it must be proven before judgment of fraud can be entered; and while there are one or two suspicious circumstances in this case,—as for instance the sending of the \$1,600 draft to Henry Frazer for the benefit of his brother Benjamin Frazer,—yet this was only an incident in the whole transaction, and the only one we have been able to discover, which is not consistent on its face with the theory of good faith; and as the transaction was several years ago, it might well happen that the witness had forgotten many things which would serve to explain.

We have examined with particular care the testimony in reference to deposits in the banks, and we think it not unlikely that men of the business character of these respondents would not be able to produce any evidence of the mode of their transaction with the banks or with the volume of business transacted at a time so long ago; and the testimony of the officers of the banks was not by any means conclusive that the respondents did not have the money deposited in the respective banks which they testified they had.

On the whole, we think, applying the most liberal

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rules in favor of the appellant, that he has failed to overcome the burden of establishing fraud upon these respondents in the transaction attacked, and finding no error in any other respect, the judgment will be affirmed.

SCOTT, GORDON and ANDERS, JJ., concur.

HOYT, C. J., dissents.

[2251. Decided November 16, 1896.]

C. P. UDIN, *Respondent*, v. CHARLES CROSSMAN *et ux.*,
Appellants.

FRAUD — SUFFICIENCY OF EVIDENCE — COMMUNITY LIABILITY.

In an action to recover a sum of money, which plaintiff had been induced to pay for the purchase of a mine in reliance upon false representations of the defendants, evidence is admissible showing that the defendants had made representations to other parties than plaintiff, and to the people in the vicinity generally, regarding the existence and character of the mine and the value of its ores, such representations being part of one continuous scheme or transaction for the purpose of selling the mine to any one that could be induced to buy.

A judgment for plaintiff, in an action to recover money paid for the purchase of a mine, will not be disturbed when there is evidence tending to show that the mine in fact had no existence, the location being invalid, and that the ore exhibited as a sample did not come from the mine at all.

A judgment against husband and wife is warranted in an action to recover money which plaintiff was induced to pay for certain property upon the false representations of the husband, when title to the property was in the wife's name and the consideration therefor was community property.

Appeal from Superior Court, Spokane County.—
Hon. JOHN MCBRIDE, Judge *pro tem.* Affirmed.

15	519
18	279
15	519
237	572

William T. Stoll, for appellants:

The burden is on plaintiff to show the concurrence of the following, viz: That there were false representations of material facts made to him; that such were known to be false; that they were made to deceive and were acted upon; that damage resulted therefrom. Cooley, Torts, §§ 480-483; Bigelow, Torts, p. 2. The false representations must be the statement of a material fact, and not the mere expression of an opinion; the value of property or its utility for a given purpose is always a mere matter of opinion upon which men must necessarily differ. *Tuck v. Downing*, 76 Ill. 71; *Parker v. Moulton*, 19 Am. Rep. 315; *Ellis v. Andrews*, 15 Am. Rep. 379; *Slaughter's Adm'r. v. Gerson*, 13 Wall. 385.

Plummer & Thayer, for respondent:

In the case here the defendant, Charles Crossman, occupied about a month in inducing people to buy into this alleged mine, and this so-called collateral testimony covered these transactions and were admissible not only for the purpose of showing intent and fraudulent motive, but were admissible also as *res gestae*, all these acts being a part of and inseparably connected with one single continuous scheme to unload this particular mine upon innocent purchasers by means of false representations; it was all one transaction, one enterprise, and the testimony was properly admitted. Where the intent is in question, evidence of collateral facts of a nature similar to the acts under investigation is admissible for the purpose of disclosing the intent and thus showing whether the false representations were planned or were made with knowledge of their falsity or were made in good faith. *Mudsill Mining Co. v. Watrous*, 61 Fed. 163; *Hoxie v. Insurance Co.*, 32 Conn. 21 (85 Am. Dec. 240); *Ross*

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v. Miner, 35 N. W. 60; *Rafferty v. State*, 16 S. W. 728; *Jordan v. Osgood*, 109 Mass. 461 (12 Am. Rep. 731); *Castle v. Bullard*, 23 How. 174; *Butler v. Watkins*, 13 Wall. 457; *Insurance Co. v. Armstrong*, 117 U. S. 598.

The opinion of the court was delivered by

SCOTT, J.—The plaintiff brought this suit to recover a sum of money paid to the defendants for the purchase of a mine. The cause was tried without a jury and the findings and judgment were in favor of the plaintiff, and the defendants have appealed.

The first error complained of is over the admission of certain testimony, and it is contended that some of the necessary findings of the court are totally unsupported except by the testimony in question. This testimony related to representations made by the defendants, or by Charles Crossman, the husband, regarding the existence and character of the mine in controversy, and as to the value of the ores therein contained. It is urged that the same is inadmissible on the ground that the representations were not specifically made to the plaintiff, but were made to other parties, or to the people in the vicinity generally. We think this testimony was admissible. It is evident that the purpose of the defendants was to sell the mine to any one that could be induced to purchase it, and that it was all one continuous scheme or transaction, and the plaintiff was not precluded from showing such representations made in furtherance of that purpose, although the same were not made to him personally.

It is further contended that the findings are not sustained by the evidence, and that, if they are, they do not support the judgment. Without entering upon a discussion in detail of the points urged under these

heads, we think it sufficient to say that there was evidence tending to show that the mine in fact had no existence, the location being invalid, and that the ore exhibited as a sample did not come from the mine at all, and there was evidence to sustain the findings which the court made, and the facts found sustain the judgment entered.

It is next contended that the plaintiff was not entitled to a judgment against Mabel Crossman, on the ground that it was not a community liability; but the alleged title to the mine was in her name and the consideration paid therefor was clearly community property, and this contention is untenable.

Affirmed.

GORDON, ANDERS and DUNBAR, JJ., concur.

15 522
36 184

[No. 2281. Decided November 16, 1896.]

CHARLES HENRY PAYNE, *Appellant*, v. THE SPOKANE
STREET RAILWAY COMPANY, *Respondent*.

APPEAL—GENERAL OBJECTIONS—NEGLIGENCE OF PASSENGER CARRIERS—DEGREE OF CARE—INSTRUCTIONS.

The objections that a statement of facts had not been settled in conformity with the law and that the appeal had not been legally taken, will not be considered, when no specific error has been called to the court's attention either in the brief or by reference to the transcript.

An instruction is erroneous which charges the jury in an action for injuries received by a passenger through defendant's negligence in running a street car at a high rate of speed, that "ordinary care is such care as persons usually engaged in the particular line of business in question ordinarily exercise in and about such business. If defendant in this case exercised such care at the time of the accident, it had discharged its full duty and plaintiff cannot re-

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Opinion of the Court—Scott, J.

cover," since the highest degree of skill and care is required by law of a common carrier of passengers.

The failure of appellant to bring up more of the instructions than the paragraph complained of will not raise a presumption that the error was subsequently obviated by the court in its further instructions to the jury.

Appeal from Superior Court, Spokane County.—
Hon. NORMAN BUCK, Judge. Reversed.

Winston & Winston, for appellant :

The law very wisely exacts from a common carrier of passengers for hire, in the performance of his duties as such, the utmost care and skill which prudent men are accustomed to use under similar circumstances. 2 Shearman & R., Negligence (4th ed.), § 495; Redfield, Railways (6th ed.), 240; *Cogswell v. West St. Ry. Co.*, 5 Wash. 46; *Sears v. Seattle, etc., Ry. Co.*, 6 Wash. 227; *Coddington v. Railway Co.*, 102 N. Y. 66; *Fairchild v. Stage Co.*, 13 Cal. 599; *Chicago City Ry. Co. v. Engel*, 35 Ill. App. 490; *City & Suburban Ry. Co. v. Findley*, 76 Ga. 311; *Philadelphia & Reading Co. v. Bayer*, 97 Pa. St. 91; Ray, Negligence of Imposed Duties, 217; Booth, Street Railway Law, 450; Thompson, Carriers of Passengers, 200.

Thomas C. Griffiths, for respondent.

The opinion of the court was delivered by

SCOTT, J.—The plaintiff was a passenger on one of defendant's cars, and while it was rounding a curve was thrown from it through the open doorway and injured. He brought this action to recover damages, alleging that the defendant was guilty of negligence in running its car at a high and dangerous rate of speed around the curve. The verdict was for the defendant and the plaintiff has appealed.

The respondent moves to strike the statement of facts on the ground that the same has not been settled in conformity with the law, and to dismiss the appeal on the ground that the same is not legally taken; but as no specific error has been called to our attention either in the brief or by reference to the transcript, the motion will be denied.

But a single question is raised upon the appeal and that is as to an instruction given by the court to the jury, that

“Ordinary care is such care as persons usually engaged in the particular line of business in question, ordinarily exercised in and about such business. If defendant in this case exercised such care at the time of the accident, it had discharged its full duty and plaintiff cannot recover.”

It is contended that this instruction does not lay down the proper rule in such cases, and we think this contention is well taken, for the question was not whether the defendant had exercised such care as was usually exercised by persons in that particular business, but the question was whether it had exercised such care as the law required, and we think it is well settled that a common carrier of passengers is required to exercise the highest degree of skill and care which may reasonably be expected of intelligent and prudent persons engaged in that business, in view of the instrumentalities employed and the dangers naturally to be apprehended.

The respondent contends that the appellant should not be allowed to urge this question for the reason that he has not brought up all of the instructions of the court, and therefore that we should presume that proper instructions were subsequently given. We can not adopt this view of the practice. If the error

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complained of could have been and was subsequently obviated by the court in its further instructions to the jury, the burden should be held to be upon respondent to show it, and it should have seen to it that such instructions were made a part of the record on the appeal.

Reversed.

HOYT, C. J., and ANDERS, GORDON and DUNBAR, JJ.,
concur.

15	525
18	363

[Nos. 2328 and 2421. Decided November 16, 1896.]

In the Matter of the Assignment of H. H. Day, Insolvent:

FRANK D. DAY *et al.*, Appellants, v. E. B. SINES,
Assignee, et al., Respondents.

C. G. ALFORD AND COMPANY, Appellants, v. E. B.
SINES, Assignee, *et al., Respondents.*

ASSIGNMENT FOR BENEFIT OF CREDITORS — DELIVERY OF DEED TO ASSIGNEE — CHATTEL MORTGAGE — ACCEPTANCE BY CREDITOR — DELIVERY.

The delivery of a deed of assignment to the assignee for the purpose of having him indorse thereon his acceptance of the trust and its return by him to the assignor for the purpose of having it recorded by the latter, does not constitute such a delivery as will give the deed priority over chattel mortgages which had been duly executed, delivered and recorded prior to the record of the deed of assignment.

The leaving of a fully executed chattel mortgage with the attorney for the mortgagee constitutes a delivery to the latter.

Where a debtor has been requested by creditors to give them security upon his property whenever it shall become necessary to protect their interests, the execution by him and placing of record of chattel mortgages in their favor will be presumed to be with their consent and consequently effective as a valid delivery.

Appeal from Superior Court, Pierce County.—Hon. EMMETT N. PARKER, Judge. Reversed.

Johnson Nickeus, and *Marshall K. Snell*, for appellants:

An assignee, under the general assignment law, takes no better title than his assignor had and is affected by all the equities existing as against him. The right of a general creditor is limited to property that passes by the assignment, and is limited also to the property in the condition in which it passes. A chattel mortgage to secure a valid debt given before the execution of an assignment for the benefit of creditors, but not filed until after the assignment is executed, is not void as against the assignee and creditors for the want of filing, unless it is shown that creditors are represented who became such after the making and before the filing of the mortgages. *Wilson v. Esten*, 14 R. I. 621; *Hawks v. Pritzlaff*, 51 Wis. 160; *Wakeman v. Barrows*, 41 Mich. 363; *Merwin v. Austin*, 58 Conn. 34; *Shaw v. Glen*, 37 N. J. Eq. 35; *Stewart v. Platt*, 101 U. S. 731; *Keller v. Smalley*, 63 Tex. 512.

Creditors attacking conveyances by an insolvent for fraud must do it through the assignee, and if a chattel mortgage by the assignor is good against the assignee it is good against creditors. *Jacobi v. Jacobi*, 14 S. W. 736; *Rumsey v. Town*, 20 Fed. 558; *Yates v. Dodge*, 13 N. E. 847; *Lowe v. Wing*, 56 Wis. 31; *Hach v. Hill*, 14 S. W. 739; *Brown v. Brabb*, 34 N. W. 403; *Belding v. Frankland*, 8 Lea, 67 (41 Am. Rep. 630); *O'Hara v. Jones*, 46 Ill. 288; *Roberts v. Corbin*, 26 Iowa, 315 (96 Am. Dec. 146); *Wakeman v. Barrows*, 41 Mich. 363.

Some time prior to the execution of the note and

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Argument of Counsel.

mortgage to Emma L. Day she had stated to her husband that she wanted security for her claim. When the note was delivered to her her husband stated that a mortgage would be executed to secure the same, and this was done on the next day and filed for record. This was a sufficient delivery under the facts in this case. *Thayer v. Stark*, 6 Cush. 11; *Enworth v. King*, 50 Mo. 477; *Molineux v. Coburn*, 6 Gray, 124; *Herman*, Chattel Mortgages, § 64.

Murray & Christian, Hudson & Holt, Easterday & Easterday, Doolittle & Fogg, and Sharpstein & Blattner, for respondents :

By the execution and delivery of the deed of assignment to, and the acceptance of the trust by, the assignee, the title to all the property of the insolvent vested, *eo instante* that the trust was accepted, in the assignee for the benefit of all the insolvent's creditors, in proportion to the amount of their respective claims, to be dealt with in the manner pointed out by law, under the supervision of the court. That instant the rights of all creditors, with reference to the insolvent's estate, were unalterably fixed. If at that time the estate of the insolvent was not charged with liens, as against the insolvent's creditors, for whom the assignee thereafter held it, no action could be taken or act performed by any person that would secure for any creditor anything other than a *pro rata* share of the trust estate. *Warner v. Jaffray*, 96 N. Y. 248 (48 Am. Rep. 616); *McKinney v. Rhoads*, 5 Watts, 345; *Johnson v. Sharp*, 31 Ohio St. 611 (27 Am. Rep. 529); *Stamp v. Case*, 41 Mich. 267 (32 Am. Rep. 156); *Marston v. Coburn*, 17 Mass. 454; *Brevard v. Neely*, 2 Sneed, 164; *Wadleigh v. Merkle*, 57 Wis. 517; *Klapp v. Shirk*, 13 Pa. St. 589.

The assignee of an insolvent debtor takes the estate

for the benefit of all creditors of the insolvent in proportion to the amount of their respective claims, free from liens thereon by virtue of unrecorded mortgages, declared by the laws of the various states to be void as to creditors. *Bingham v. Jordan*, 1 Allen, 373 (79 Am. Dec. 748); *Hanes v. Tiffany*, 25 Ohio St. 549; *Becker v. Anderson*, 9 N. W. 640; *Withrow v. Citizens' Bank*, 40 Pac. 639; *Lockwood v. Slevin*, 26 Ind. 124; *Goodrich v. Michael*, 3 Colo. 77; *Story v. Cordell*, 33 Pac. 6; *Blandy v. Benedict*, 42 Ohio St. 295; *Betz v. Snyder*, 28 N. E. 234; *Beamer v. Freeman*, 24 Pac. 169.

The opinion of the court was delivered by.

HOYT, C. J.—A motion to dismiss the appeal has been interposed in one of the above named cases for the reason that all parties who had appeared therein had not been served with notice. But in our opinion the record disclosed facts which authorized the appellants to assume that those served represented all necessary parties. The motion will be denied.

On December 28, 1895, H. H. Day, the insolvent herein, executed his three chattel mortgages, one to F. D. Day, one to Emma L. Day and one to C. G. Alford & Company. These mortgages were all left with Johnson Nickeus, who had prepared them, for execution, who, being called away from his office requested his brother William D. Nickeus to have them recorded in the auditor's office on said 28th day of December. They were not recorded on that day, but were on the Monday following, the 30th day of December, filed for record by William D. Nickeus, who caused the entry to be made that they were filed at the request of Johnson Nickeus. On said 30th day of December, before said mortgages were recorded, the mortgagor, H. H. Day, made an assignment for the benefit of his

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creditors to one J. W. Cloes. This assignment, after having been prepared and executed by said Day, was by him handed to the assignee therein named, who indorsed thereon, "I hereby accept the trust created by the above instrument and agree faithfully to perform the same," and signed said indorsement, and immediately returned the deed of assignment to the assignor who took it to the auditor's office and caused it to be recorded; but it was not so recorded until after the recording of the chattel mortgages hereinbefore mentioned.

Thereafter, in the matter of the assignment of said H. H. Day, the several mortgagees presented their claims founded upon said mortgages and the notes secured thereby, and asked that they be allowed as preferred claims. Objections to such allowance were duly made, and such proceedings were had in the matter that the superior court found that the several mortgages were executed by said Day for the purpose of securing *bona fide* claims held by the mortgagees against him; that of Frank D. Day and that of C. G. Alford & Company being for the full amount of the mortgages, and that of Emma L. Day in an amount a little less than that named in the mortgage. The court further found that these mortgages were executed in good faith, and without any contemplation on the part of the mortgagor to take the benefit of the insolvent act. It, however, refused to order that the claims founded thereon should be given any preference over others by reason of the fact that they were secured by these mortgages, for the reason that in its opinion the mortgages did not take effect as against the assignee of the mortgagor because they were not recorded until after the assignment had taken effect, and the said several mortgages were held to be void

and of no effect as against said assignee or his successor, who had been duly elected by the creditors of the insolvent. From this order the claimants F. D. Day and Emma L. Day have joined in an appeal to this court, and the claimants C. G. Alford & Company have also prosecuted an appeal therefrom.

Both appeals involve the same questions and will be considered together. From the facts above recited the superior court was of the opinion that the deed of assignment was delivered and took effect at the time it was handed to the assignee and his acceptance of the trust indorsed thereon, and for that reason held that it was superior to the mortgages which, though executed, were not at that time on record. But in our opinion what was done at the time did not constitute a delivery of the deed of assignment so as to give it effect. It is not necessary for us to decide as to whether such deeds of assignment become effective and irrevocable before they have been recorded in the proper office, when delivered to and retained by the assignee therein named, for the reason that the facts proven did not show that the assignor had so parted with the possession of the deed in question as to divest him of the right to control it. The simple fact of its delivery to the assignee for the purpose of having his acceptance of the trust indorsed thereon, taken in connection with the fact that such indorsement was made in the presence of the assignor, who at once thereafter resumed possession of the instrument, was not sufficient to show an intention on his part to divest himself of the right to retain possession of the deed to dispose of as he saw fit. If, after having resumed possession of the deed, he had destroyed it, he would have been guilty of no wrongful act.

In our opinion the deed was not so delivered that it

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took effect until it was presented for record in the auditor's office, and since this was not done until after the chattel mortgages had all been recorded, the property of the insolvent passed to the assignee charged with the lien of these mortgages, if they had been properly executed and delivered at the time they were recorded. That they were executed in good faith and for a valuable consideration was expressly found by the trial court, and as to the one to F. D. Day, there could be no question as to its delivery. It was fully executed and left as an effective instrument with the attorney for the mortgagee. As to the others, the person with whom they were left with instructions to have them recorded was not the agent or attorney of the mortgagees, yet, under the circumstances disclosed by the undisputed evidence, these mortgages, when recorded, were so delivered that they became effective. The mortgagor had been requested by the mortgagees to give them security upon his property, and he had agreed to do so whenever it became necessary to protect their interests. This being so, we think that the execution of the mortgages and the placing them upon record will be presumed to have been by their consent, and, if it was, they were sufficiently delivered.

The order appealed from will be reversed so far as it affects the rights of any of these appellants, and their claims against the insolvent estate will, to the extent to which they have been found to be *bona fide*, be given a preference over those of unsecured creditors in the settlement of the estate of the insolvent, and as a part of such claims the costs of appellants will be included.

ANDERS and GORDON, JJ., concur.

DUNBAR, J., dissents.

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[No. 2339. Decided November 16, 1896.

BLANCHE BUTLER AMES, *Respondent*, v. EMELINE BIGELOW *et al.*, *Appellants*.

MORTGAGE FORECLOSURE — INSUFFICIENCY OF EVIDENCE — STIPULATION FOR ATTORNEY'S FEES.

A finding by the court in a foreclosure proceeding that a mortgage had become due prior to the date of its maturity is warranted, when the mortgage provides that the mortgagee has an option to declare the whole sum due for failure to pay any installment of interest, and there is evidence sufficient to show such election.

The action of the court in allowing the attorney's fee provided in a note and mortgage as payable in case of foreclosure is warranted, although there is no other proof of the value of services in such proceedings than the agreement contained in the instruments sued upon, which had been introduced in evidence.

Appeal from Superior Court, King County.—Hon. J. W. LANGLEY, Judge. Affirmed.

Robinson & Rowell, for appellants.

Elder & Harger, for respondent.

The opinion of the court was delivered by

HOYT, C. J.—This appeal is from a decree foreclosing a mortgage made by the appellants to the respondent. Three errors are assigned. The first is founded upon the finding by the court that the mortgage was due; the second, upon the ruling of the court in refusing to allow one of the appellants to testify as to what he did on the strength of certain letters received from the husband of the respondent; and the third, upon the action of the court in allowing the sum of \$500 as attorneys' fees.

As to the first, it is sufficient to say that there was abundant proof to show that the respondent had, un-

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der the terms of the mortgage, elected to declare the whole sum due by reason of the non-payment of installments of interest; and the letters from the husband of respondent, relied upon by the appellants to show that there had been no such election, were entirely insufficient for that purpose.

The second assignment is without merit, for the reason that the letters referred to were not such as to show any change in the relation of appellants to the principal and interest provided for in the mortgage and note thereby secured.

The third assignment is founded upon the alleged fact that the court fixed the attorneys' fees without any proof having been introduced which would authorize such action on its part; but in making this claim appellants have overlooked the fact that the mortgage and note were introduced in evidence and that therein it was stipulated by the appellants that, in case of foreclosure, \$500 should be included in the decree for attorneys' fees.

We find no error in the record and the judgment will be affirmed.

GORDON, ANDERS, SCOTT and DUNBAR, JJ., concur.

[No. 2348. Decided November 16, 1896.]

THE STATE OF WASHINGTON, *Respondent*, v. GEORGE
MILES, *Appellant*.

TRIAL — REQUEST FOR WRITTEN INSTRUCTIONS — FAILURE OF COURT TO
COMPLY — IMPEACHMENT OF WITNESS.

The giving of a partly written and partly oral charge to the jury is error, where written instructions have been requested; and the fact that a stenographer present in court took down the charge as given by the judge is not a sufficient compliance with the requirements of the statute in that respect.

A witness cannot be impeached as to his truth and veracity by the testimony of other witnesses that, from their knowledge of his reputation, they would not believe him under oath.

Appeal from Superior Court, Spokane County.—
Hon. NORMAN BUCK, Judge. Reversed.

Plummer & Thayer, for appellant:

The failure of the judge to give the charge in writing when a request therefor has been made is error for which the judgment should be reversed. 2 Thompson, Trials, § 2375; *Wettengel v. Denver*, 39 Pac. 343; *Bowden v. Achor*, 22 S. E. 254; *Sellers v. Greencastle*, 34 N. E. 534; *Dixon v. State*, 13 Fla. 636; *Miller v. Hampton*, 37 Ala. 342; *People v. Ah Fong*, 12 Cal. 345; *Ray v. Wooters*, 19 Ill. 82; *State v. Potter*, 15 Kan. 302; *Swartwout v. Michigan Air Line R. R. Co.*, 24 Mich. 389; *Horton v. Williams*, 21 Minn. 187; *State v. Jones*, 61 Mo. 232; *Bradway v. Waddell*, 95 Ind. 170; *Hopt v. People*, 104 U. S. 631; *Head v. Langworthy*, 15 Iowa, 235; *Householder v. Granby*, 40 Ohio St. 430; *Patterson v. Ball*, 19 Wis. 243.

It is competent for witnesses after testifying that the reputation of a witness for truth and veracity is

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Opinion of the Court—SCOTT, J.

bad, to further testify that from their knowledge of his reputation they would not believe him under oath. 1 Thompson, Trials, § 532; *Wilson v. State*, 3 Wis. 799; *Sorrelle v. Craig*, 9 Ala. 534; *Hadjo v. Gooden*, 13 Ala. 721; *People v. Tyler*, 35 Cal. 553; *Massay v. Farmer's National Bank*, 104 Ill. 327; *Nelson v. State*, 32 Fla. 244; *Stokes v. State*, 18 Ga. 17; *Titus v. Ash*, 24 N. H. 319; *Keator v. People*, 32 Mich. 486; *Lyman v. Philadelphia*, 56 Pa. St. 488; *Knight v. House*, 29 Md. 194 (96 Am. Dec. 515); *Adams v. Greenwich Ins. Co.*, 70 N. Y. 166; *Ford v. Ford*, 7 Humph. 92; *Uhl v. Commonwealth*, 6 Grat. 706; *State v. Johnson*, 19 Pac. 749; *Hudspeth v. State*, 50 Ark. 534; *Hamilton v. People*, 29 Mich. 173.

J. W. Feighan, Prosecuting Attorney, for The State.

The opinion of the court was delivered by

SCOTT, J.—The defendant was convicted of larceny and has appealed. One of the errors complained of is the failure of the court to instruct the jury in writing, the defendant having requested the court to give written instructions. The charge given was partly written and partly oral, and for this reason the case must be reversed and remanded for a new trial.

The fact that a stenographer was present, who took down the charge as given, was not a sufficient compliance with the statute. (Code Proc., § 354, subd. 4.)

Another error complained of was in relation to the impeachment of a witness. Testimony had been introduced to show that his reputation for truth and veracity was bad, and the witnesses were then asked whether from their knowledge of his reputation they would believe him under oath, and the court sustained an objection to the question. We think the weight of authority is now against permitting witnesses to tes-

tify to their opinions in this respect, and the objection was properly sustained.

HOYT, C. J., and ANDERS, GORDON and DUNBAR, JJ., concur.

[No. 2373. Decided November 16, 1896.]

GEORGE C. McKEE, *Respondent*, v. F. H. WHITWORTH
et ux., *Appellants*.

APPEAL—FAILURE TO EXCEPT TO FINDINGS OF FACT—CONTRACTS—
WHEN SURETY PRIMARILY LIABLE—LIABILITY OF COMMUNITY FOR
SURETYSHIP DEBT.

When findings of fact made by the lower court are not excepted to, they must be considered on appeal as setting forth the facts in the case.

Where a surety, in order to avoid suit at the maturity of a note upon which he is liable, makes a new note to the payee with himself and wife as principals, under an agreement that such note should be the principal debt and that the original note should be held by the payee as collateral to the new note, he cannot insist that it is the duty of the payee to first collect such original note.

Where a husband and wife are liable upon a promissory note executed by them evidencing a community indebtedness, the wife cannot escape liability from the fact that an extension of the time of payment of the note was secured by the husband for a valuable consideration, without her knowledge or consent.

Appeal from Superior Court, King County.—Hon. THOMAS J. HUMES, Judge. Affirmed.

Stratton, Lewis & Gilman, for appellants.

Thompson, Edsen & Humphries, and *R. J. Huston*, for respondent.

The opinion of the court was delivered by

DUNBAR, J.—The statement of this case, as we view

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it, is pretty much all there is to it. The action is upon a promissory note signed by the defendants, in favor of the plaintiff, dated May 4, 1893, for \$2,508.80. The complaint contains the usual affirmations and, in addition, alleges that the defendants are husband and wife; and that the note was given for a community debt. The affirmative answer, upon which the defendants rely, is in substance that, at the date of the execution of the note by defendants, one Jennings and wife were indebted to plaintiff on a note dated May 4, 1892, in the sum of \$2,240, and accrued interest, amounting to \$2,260.80, which was secured by a mortgage on certain real property owned by Jennings and wife; and that the note in suit was made as collateral security for the Jennings' note; that the Jennings' note is still unpaid; that neither of the defendants received any value for the making of said alleged collateral note, but that the same was made for the accommodation of Jennings and wife, and that this fact was known to the plaintiff; that on the 7th day of May, 1894, plaintiff and Jennings and defendant F. H. Whitworth entered into an agreement in writing whereby it was agreed, in consideration of the payment to plaintiff of \$225, that plaintiff would extend the time of payment of the note sued on for six months from May 4, 1894, and that the rate of interest reserved in said note should be reduced to twelve per cent. per annum; that Jennings thereupon paid said \$225, and the said extension was made without the knowledge or consent of the defendant Ada J. Whitworth. A second affirmative defense alleges that plaintiff still holds the Jennings and wife note and mortgage and has taken no steps to realize the amount due out of the makers or the mortgaged property. A demurrer was interposed to the affirmative defense, which was

overruled. Whereupon the affirmative matter pleaded in the answer was denied by reply. The cause was tried without a jury, and judgment rendered in favor of plaintiff, as prayed for in the complaint.

The appellants contend that the amount of the judgment is excessive; that upon the facts found by the court, the defendant Ada J. Whitworth is entitled to judgment in her favor; that, inasmuch as the note sued upon was a mere accommodation note and the time for the payment was extended without the knowledge or consent of Mrs. Whitworth, she is released from her responsibility; and further that, under the agreements entered into in this case, it was the duty of the plaintiff to collect the first note given by Jennings and wife.

The findings of fact were not excepted to and must, therefore, be considered the facts in the case. On the question of the excess of judgment, the court having found the amount due from defendants to plaintiff on the note, and that fact not having been excepted to, this court will not inquire into the correctness of the computation made by the trial court.

From the findings, it appears that defendant Whitworth was surety upon the note executed by Jennings and wife to the plaintiff on the 4th day of May, 1892; that after the maturity of that note and on the 4th day of May, 1893, the defendants, in order to prevent any action being brought by the plaintiff against defendant Whitworth as surety, and for the purpose of relieving said Whitworth from liability on said note, executed to the plaintiff the promissory note which is the subject of this suit. This is set forth in the agreement entered into at the time of the execution of the note. The court found, and the agreement plainly shows, that it was the evident intention of the par-

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ties, that the note in suit was given in payment as between respondent and Jennings and wife and F. H. Whitworth, and that the note in suit became the principal debt, and the original note became collateral security for the note in suit. The condition of the agreement is as follows:

“Whereas said Whitworth has given his own promissory note, signed by his wife, Ada J. Whitworth, to the said George C. McKee, for the sum of \$2,508.80, payable one year after date, for the purpose of preventing any action being brought against him as surety, and for the purpose of satisfying said McKee and of relieving himself from any liability on said first named note (with the express understanding and agreement, however, that said last named note is to be paid when due). Now, it is hereby agreed that said first named note and mortgage shall be left with said George C. McKee as collateral security for said last named note. And it is agreed that, upon payment of said last named note, said George C. McKee will assign said first named note and mortgage to such person or persons as shall be directed by said Whitworth, it being the express understanding and intent of the parties hereto that the indebtedness secured by said mortgage shall not merge in the indebtedness created by said last named note, but that said Whitworth shall have said mortgage upon payment of said last named note, as security for all moneys paid and advanced by him for and on account of said Jennings.”

Afterwards, on the 7th day of May, 1894, defendant F. H. Whitworth and the said W. J. Jennings, by L. C. Gilman, his attorney, and the plaintiff George C. McKee, by R. J. Huston, his attorney, without the knowledge or consent of the defendant Ada J. Whitworth, made and entered into a memorandum of agreement, the pertinent portion of which is as follows:

“Witnesseth, that whereas said second party holds the promissory note of F. H. Whitworth and wife for the sum of \$2508.80, which is now overdue, secured by the collateral note of F. H. Whitworth and W. J. Jennings to the second party, said last named note being secured by mortgage; and whereas first parties desire an extension of time upon said mentioned note of six months from the 4th day of May, A. D. 1894; now it is agreed hereby that the second party does grant said extension upon the following terms and conditions, to-wit,” etc.

It would seem that, considering the terms of these agreements, and especially in view of the statements in the agreement that the note of F. H. Whitworth and wife was secured by the collateral note of F. H. Whitworth and W. J. Jennings, there is hardly room for the construction claimed by the appellants that the Jennings note was the principal note which should have been collected before resorting to the defendants upon their note. So far as the claim put forth in the interest of Mrs. Whitworth is concerned, she saw fit to sign this note to relieve her husband from being pressed upon the first note, upon which he was a surety, and she, of course, became liable upon her own contract. This contract, then, being a community contract, she would be bound under the frequent decisions of this court, by any action of her husband which was for the benefit of the community interest; and the facts as found by the court, show that the action of F. H. Whitworth in extending the time of payment was prompted by a desire to prevent the community from being sued upon the community debt, and was in the direct interest of the community; and, under the doctrine announced in the case of *Horton v. Donohoe Kelly Banking Co.*, ante, p. 399, the community will be bound.

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Opinion Per Curiam.

The judgment will be affirmed.

HOYT, C. J., and SCOTT, ANDERS and GORDON, JJ.,
concur.

[No 2389. Decided November 16, 1896.]

GEORGE E. KNAPP, *Respondent*, v. KING COUNTY, *Appellant*.

APPEALS FROM BOARD OF EQUALIZATION.

An appeal does not lie from a board of equalization to the superior court.

Appeal from Superior Court, King County.—Hon. RICHARD OSBORN, Judge. Reversed.

A. W. Hastie, and W. W. Wilshire, for appellant.

Per Curiam.—From an order of the board of equalization of King County, denying the respondent's petition for a reduction of his assessment, he appealed to the superior court for that county and the appellant having appeared therein specially and objected to the jurisdiction of that court to entertain said appeal, its objections were overruled and a judgment was entered, from which it has appealed.

An appeal does not lie from a board of equalization to the superior court. *Olympia Water Works v. Thurston County*, 14 Wash. 268 (44 Pac. 267); *Buchanan v. Adams County*, *post*.

The judgment will be reversed and the cause remanded with directions to the superior court to dismiss the proceeding.

[No. 2250. Decided November 17, 1896.]

EDWARD P. HALL, *Respondent*, v. ELGIN DAIRY COMPANY *et al.*, *Appellants*.

LIBEL — EVIDENCE OF GOOD CHARACTER — JUSTIFICATION — RIGHT TO OPEN AND CLOSE.

In an action for libel, plaintiff is not entitled to prove his general good reputation, when defendants, in order to sustain their plea of justification, have put in evidence specific instances of misconduct on the part of plaintiff.

In an action for libel, when the publication has been admitted by defendants and a defense of justification set up, the burden of proof is on defendants and they are entitled to open and close the case to the jury.

Where the basis of an action for libel is the publication of a circular by defendants charging that plaintiff as a former employee had admitted the misappropriation of money belonging to defendants, in order to establish their plea of justification defendants are only required to prove such confession, and are not required to go further and prove that plaintiff had actually misappropriated their money.

Appeal from Superior Court, King County.—Hon. THOMAS J. HUMES, Judge. Reversed.

Thompson, Edsen & Humphries, Stratton Lewis & Gilman, Thomas B. Hardin, and Pierre P. Ferry, for appellants:

Appellants made no attack on respondent's reputation; and proof of his good reputation was inadmissible to rebut the justification. *Houghtaling v. Kildershouse*, 1 N. Y. 530; *Matthews v. Huntley*, 9 N. H. 147; *Miles v. Vanhorn*, 17 Ind. 249 (79 Am. Dec. 477); *Severance v. Hilton*, 24 N. H. 148; *Chubb v. Gsell*, 34 Pa. St. 115; *Hitchcock v. Moore*, 37 N. W. 917; *Blakeslee v. Hughes*, 34 N. E. 793; *Lotto v. Davenport*, 52 N. W. 130; *Stow v. Converse*, 3 Conn. 345 (8 Am. Dec. 189); *Anderson v. Long*, 10 Serg. & R. 60; *Zitzer v. Mer-*

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kel, 24 Pa. St. 410; *Pratt v. Andrews*, 4 N. Y. 495; Wharton, Evidence (2d ed.), p. 51; Abbott, Trial Evidence, p. 675; *Howland v. Blake Mfg. Co.*, 31 N. E. 656; *Wright v. Schroeder*, 2 Curt. 550.

When the cause went to the jury there was but one issue for them to try, namely, was the justification established. The court instructed the jury to find for the respondent, unless they should find that the truth of the charge made in the circular was proved by the greater weight of the testimony, and that the burden of proof was upon the appellants. In this condition of the case our statute, in express terms, gave the appellants the right to open and close the argument. Code Proc., § 354, subd. 5; *Judah v. Trustees of Vincennes University*, 23 Ind. 282. Even under the common law rule appellants would have had the right to open and close. *McCoy v. McCoy*, 106 Ind. 493; *Tull v. David*, 27 Ind. 378; *McIntyre v. Bransford*, 17 S. W. 359; *Murray v. Insurance Co.*, 85 N. Y. 239; *Churchill v. Rogers*, Hardin, 183; *Millerd v. Thorn*, 56 N. Y. 405; To deny the right to open and close is reversible error. *Bellingham Bay, etc., Co. v. Strand*, 4 Wash. 312; *Davis v. Mason*, 4 Pick. 159; *Hill v. Perry*, 82 Ind. 31; *Blacklegge v. Pine*, 28 Ind. 467.

Appellants should not have been required to successfully maintain before the jury the burden of proving not only the confession, but the truth of that confession as well—that is to say, that the respondent told the truth when he made the confession. *Bell v. Shingle Co.*, 8 Wash. 31; *Randall v. Evening News Ass'n*, 60 N. W. 305.

Edward Von Tobel, and *William E. Humphrey*, for respondent:

When in cases of slander and libel the defendants

plead justification, this puts in issue the character of the plaintiff, and the plaintiff has the right to show that his reputation is good. *Adams v. Lawson*, 17 Grat. 250 (94 Am. Dec. 455); *Sample v. Wynn*, Busb. 319; *Bennett v. Hyde*, 6 Conn. 24; *Stow v. Converse*, 4 Conn. 42; *Sprague v. Craig*, 51 Ill. 288; *Campbell v. Campbell*, 54 Wis. 97; *Sheehey v. Cokley*, 43 Iowa, 183 (22 Am. Rep. 236); *Larned v. Buffinton*, 3 Mass. 546 (3 Am. Dec. 185); *Sayre v. Sayre*, 25 N. J. Law, 235; *Byrket v. Monohon*, 7 Blackf. 83 (41 Am. Dec. 212); *Downey v. Dillon*, 52 Ind. 442; *Williams v. Haig*, 3 Rich. 362 (14 Am. Dec. 774); *Shroyer v. Miller*, 3 W. Va. 158; *Howland v. Blake Mfg. Co.*, 31 N. E. 656; *McIntire v. Levering*, 20 N. E. 191; *Newell, Libel & Slander*, p. 824; 3 Sutherland, Damages, p. 656.

If the circular published charged or imputed a crime to the respondent, then there can be no serious contention that the evidence as to his reputation was inadmissible. It is not necessary that it directly charge the respondent with a crime. It is sufficient if the words, taken in the generally accepted meaning by those who hear the slander or read the libel charge or impute a crime. *Hess v. Sparks*, 44 Kan. 465 (21 Am. St. Rep. 300); *Drummond v. Leslie*, 5 Blackf. 453; *Haynes v. Spokane Chronicle Pub. Co.*, 11 Wash. 507; *Proctor v. Owens*, 18 Ind. 21 (81 Am. Dec. 341); *In re McDonald*, 33 Pac. 18; *Edgar v. McCutchen*, 9 Mo. 768; *Ranger v. Goodrich*, 17 Wis. 80; *Mallory v. Pioneer Press Co.*, 34 Minn. 521; *Giddens v. Mirk*, 4 Ga. 364; *Logan v. Steele*, 4 Am. Dec. 659; *McAllister v. Detroit Free Press Co.*, 76 Mich. 338 (15 Am. St. Rep. 318); *Haines v. Campbell*, 21 Atl. 702; *Montgomery v. Knox*, 3 South. 211; *Post Pub. Co. v. Moloney*, 33 N. E. 921.

It is not a defense to show that the confession was true, but to be a defense the defendants must show

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that the plaintiff was guilty of the crime charged. *Stewart v. Swift Specific Co.*, 76 Ga. 280 (2 Am. St. Rep. 40); *Cook v. Ward*, 6 Bing. 409; *Funk v. Beverly*, 112 Ind. 190; 13 Am. & Eng. Enc. Law, p. 403; *Orth v. Featherly*, 49 N. W. 640.

In reply to the point of appellants that they were entitled to open and close the argument to the jury, we ask the attention of the court to the pleadings. The answer is a denial and a justification. It denies the 4th, 5th, 6th, 7th and a part of the 3d paragraphs; denies malice, that the plaintiff was injured in his reputation or feelings that the circular was given to any but the regular customers of the Elgin Dairy Co., and that the plaintiff was in business for himself. But, even if the answer admitted everything, in this class of cases the plaintiff would be entitled to open and close. 1 Rice, Evidence, p. 128; 1 Thompson, Trials, § 230; 1 Greenleaf, Evidence, § 76; *Opdyke v. Weed*, 18 Abb. Pr. 223, note; *Hecker v. Hopkins*, 16 Abb. Pr. 301, note; *Fry v. Bennett*, 28 N. Y. 329; *Huntington v. Conkey*, 33 Barb. 218; *Johnson v. Josephs*, 75 Me. 544; *Belknap v. Wendell*, 21 N. H. 175; *Lexington Ins. Co. v. Paver*, 16 Ohio, 324; *Bowen v. Spears*, 20 Ind. 146; *Cunningham v. Gallagher*, 61 Wis. 170; *Vifquain v. Finch*, 15 Neb. 505.

The opinion of the court was delivered by

SCOTT, J.—The plaintiff brought suit for the publication of an alleged libel. The defendants plead a justification. Judgment being rendered for the plaintiff the defendants have appealed.

The defendants Galloway and Romain were partners engaged in the dairy business under the name and style of the Elgin Dairy Company, and Pratt and Berry were employees of the partnership. The plain-

tiff was also an employee of the partnership engaged in driving one of the milk wagons and making collections for milk delivered to the company's customers. There was testimony to show that the plaintiff's route, which had previously been a paying one, became, and for sometime continued to be, a losing one. The company found fault with the plaintiff and claimed that something must be wrong with his conduct of the business, which the plaintiff denied, whereupon he was taken off the route for a period of thirty days and appellant Pratt was substituted in his place. For this period the route again showed a profit. Within a few days thereafter the plaintiff applied to the company for money. His salary was fifty dollars a month, and there was then to his credit on the books something over ninety dollars. One of the firm told him that, considering the loss in the business as conducted by him, he did not think anything was justly due him, and that he ought to give the partnership a receipt in full for the balance claimed. Some considerable conversation was had between the parties, whereupon it was contended by the defendants that the plaintiff admitted that he had appropriated money belonging to the partnership, and it is conceded that he gave a receipt for the amount due him as shown by the books.

It appears that the plaintiff did no more work for the company, but engaged in like business for himself, resuming the route he had been upon while in the employ of the company, and in order to obtain the company's customers represented to them that he had been unjustly discharged, whereupon the company issued and caused to be distributed by the appellants Pratt and Berry, the following circular :

"NOTICE.

"It having come to our knowledge that E. P. Hall, formerly the driver of one of our milk wagons, is endeavoring to alienate our customers by repeating a story that we discharged him unjustly and without cause, we take this method of contradicting him, and stating that we discharged him only upon his own confession of having wrongfully converted to his own use considerable sums of money collected for, and belonging to us.

"We feel compelled to make this statement in order to protect our business from the injury he is doing us by his constant repetition of a 'tale' which he knows to be untrue. Yours respectfully,

"ELGIN DAIRY COMPANY."

which the plaintiff contends was libelous.

It is first contended that the court erred in allowing the plaintiff to prove his good reputation. The respondent contends that this evidence was admissible in consequence of the defendants' having given in evidence to sustain their plea of justification specific instances of misconduct on the part of the respondent. Many cases have been cited by counsel upon either side, but, without undertaking to review them, it seems to us the better rule is that such testimony is inadmissible and that instances of specific misconduct do not authorize the plaintiff to prove his general good reputation.

Another error complained of is the refusal of the court to allow the defendants to open and close the case to the jury. The court rightly assumed that the burden of proof was upon the defendants. The publication of the circular in question had been admitted, and the defense was a justification which the defendants had to establish. This being so, we are of the opinion that they were entitled to open and close the case.

A number of other errors complained of grow out of the view taken by the lower court of what the defendants were called upon to prove to establish their plea of justification. The case was evidently tried upon the theory that it was not sufficient for the defendants to prove that the plaintiff had in fact admitted that he had misappropriated money belonging to the company, but that they must go further and prove that he had actually misappropriated their moneys. We are of the opinion that this was erroneous. The plaintiff was charged with having confessed to the misappropriation, and this, in our opinion, was all the defendants were called upon to establish in order to sustain their defense, regardless of whether the confession imputed that the plaintiff had been guilty of criminal conduct in the premises. The charge was only that he had confessed the misappropriation, and the defendants should not have been called upon to prove anything further to sustain their justification than the fact that he did confess it, and the burden should not have been put upon them of going further and proving that what the plaintiff confessed was true.

Reversed and remanded for a new trial.

HOYT, C. J., and DUNBAR, ANDERS and GORDON, JJ.,
concur.

[No. 2316. Decided November 17, 1896.]

THE STATE OF WASHINGTON, *Respondent*, v. WILLIAM
CAREY, *Appellant*.

JURORS — BIAS — HOMICIDE — INFORMATION — INSTRUCTIONS — SUFFICIENCY OF EVIDENCE.

Error in overruling a challenge for actual bias interposed to a juror is without prejudice, when the juror is subsequently excluded upon the peremptory challenge of the adverse party.

Where the examination of a juror shows that no fixed or definite opinion exists in his mind relative to the merits of a criminal prosecution, but only a vague or merely floating impression based upon a newspaper report of the case, or heard at about the time of the commission of the supposed crime, the juror is not subject to a challenge on the ground of bias.

Where the information in a prosecution for murder charges that the homicide was committed by means of striking and beating the deceased with "a heavy blunt instrument; a more particular description of which is to the prosecuting attorney unknown," the introduction in evidence of a broken oar, which had been found in the possession of the defendant, is not objectionable on the ground of variance, when it is not established on the trial what instrument it was that caused the death, other than that it was a heavy blunt one, and it is not shown that a description of the instrument was known by the prosecuting attorney at the time of filing the information.

The refusal of the court to instruct the jury as requested, upon defendant's theory of the case that death had been occasioned by a severe fall and not by the means charged in the information, is not erroneous, when the subject matter is covered by the general charge that, if it is possible to account for the death of the deceased upon any reasonable hypothesis other than that of the guilt of the defendant, it is their duty to do so and find the defendant not guilty, and by the further charge that, if the jury entertain any reasonable doubt upon any single fact or element necessary to constitute the offense, it is their duty to acquit him.

An instruction by the court in a murder case, charging the jury that "in the case of the defendant you have the right to consider the great interest he has in the result of your verdict," is not objectionable on the ground of being a judicial comment upon the evidence.

15	549
18	172
15	549
28	212
15	549
29	478
129	479

Where the court has correctly instructed the jury as to how intoxication should be regarded by them in determining the degree of defendant's guilt, in the event that they should find that he was intoxicated at the time of the commission of the offence, as claimed by the defense, a verdict of murder in the first degree is not erroneous, when there is evidence tending to support it.

A verdict of murder in the first degree is warranted, when there is evidence showing that defendant, who was living with an Indian woman, prompted by jealous motives had rudely assaulted her on the day of her murder, by striking her in the face and body with his clenched fist; that he had declared to another person that he would do her up that night; that about midnight a boat was seen out in Elliott bay going in the direction of Duwamish river in which were two persons, one beating the other with some instrument, the sound of blows and groans being audible; that the defendant and deceased had been spending the day in Seattle and had started for their home at the mouth of the Duwamish river at about eight o'clock in the evening, and that defendant had stopped about eleven that night at a saloon on the water front between the place he had been visiting in Seattle and his home; that after arriving home he called at a neighbor's and asked if he had seen anything of the deceased, claiming that she was to have come home by means of a street car; that about a day and a half later he asked this neighbor to help bury his wife, as she was dead; that such neighbor declined to assist and informed the officers, who arrested defendant; that defendant remarked several times that he wished he had killed the neighbor instead of the woman; that the woman was found sunk in the water near defendant's float house with a rope attaching the body to the float; and that an autopsy showed that death had resulted from concussion of the brain produced by blows upon the head from some blunt instrument.

Appeal from Superior Court, King County. — Hon. THOMAS J. HUMES, Judge. Affirmed.

Melvin G. Winstock, and *John B. Wright*, for appellant.

A. W. Hastie, Prosecuting Attorney, and *W. W. Wilshire*, for The State.

The opinion of the court was delivered by .

GORDON, J.—The appellant was convicted in the su-

perior court for King county of the crime of murder in the first degree and sentenced to death. From the judgment of conviction and an order denying his motion for a new trial, he has appealed.

1. The first assignment is that the court erred in overruling his challenge for actual bias interposed to jurors VanWort, Roberts and Osborn. As to juror Roberts, it is sufficient to say that the action of the court in overruling the challenge was without prejudice, even if erroneous, inasmuch as it appears from the record that he was subsequently excluded upon the peremptory challenge of the prosecution. From a consideration of the *voir dire* examination of jurors Van Wort and Osborn, we are satisfied that they were competent and impartial jurors. Counsel for the defendant cite the cases of *State v. Murphy*, 9 Wash. 204 (37 Pac. 420); *State v. Wilcox*, 11 Wash. 215 (39 Pac. 368); and *State v. Rutten*, 13 Wash. 203 (43 Pac. 30), decided by this court; but, in our opinion, the record in this case does not justify their claim that the question here presented is within the rule announced in any of these cases. The record in this case clearly and satisfactorily shows that no fixed or definite opinion existed in the minds of either of said jurors relative to the merits of the case, but only a vague, indefinite or merely floating impression based upon a newspaper report of the case, or heard at about the time of the commission of the supposed crime. The ruling of the lower court may well be sustained without in any wise infringing upon anything that is laid down in any of the cases above referred to.

2. It is next objected that there was a variance between the allegations of the information and the proof, in this: The information charges that the appellant "purposely and of his deliberate and premedi-

"tated malice killed one Lucy Williams, by then and there purposely, and of his deliberate and premeditated malice striking and beating the said Lucy Williams, thereby inflicting in and upon the said Lucy Williams several mortal contusions, fractures and wounds, with a heavy blunt instrument, which he, the said William Carey, then and there had and held in his hands. *A more particular description of which said heavy blunt instrument is to the said prosecuting attorney unknown;*" and it is contended that the record shows that the "heavy blunt instrument" was a certain broken oar found in the possession of the appellant, and which oar was offered by the prosecution and received in evidence; and that it further appears that this oar was in possession of the prosecution and that the prosecuting attorney had full knowledge of its existence at the time of filing the information in question. Counsel has cited numerous cases in which it has been held that where an indictment charges a defendant with committing an offense against the person or property of a person unknown, and it appears at the trial that the name of the person was in fact known to the grand jury, the defendant must be acquitted. *Commonwealth v. Blood*, 4 Gray, 31; *State v. Stowe*, 132 Mo 199 (33 S. W. 799); *Presley v. State*, 24 Tex. App. 494 (6 S. W. 540); *Commonwealth v. Thornton*, 14 Gray, 41.

The reason is found in the rule requiring fullness and precision in charging an offense, and that the identity of the offense charged with that upon which the conviction is sought should be established upon the trial. An allegation in an indictment or information that the name of a person or a fact *necessary to be alleged* is unknown, is permissible only from necessity. But however sound may be the rule for which counsel contends, we do not think that it is applicable to the

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present case. It is true that it is charged in the information that the homicide was committed by means of striking and beating the deceased with "a heavy blunt instrument; *a more particular description of which is to the prosecuting attorney unknown;*" but it was not established by the evidence on the trial what that instrument really was, or that its description was known by the prosecuting attorney at the time of filing the information or up to the time of the trial. There was evidence from which the jury might well have found that the blows or wounds causing death were inflicted with an oar, and there were in all three oars introduced in evidence,—one by the state and two by the defendant. But we think that it cannot with certainty be told from the record that the wounds were inflicted with either or all of them. While, upon the other hand, from the condition and appearance of the deceased and the expert and other testimony, there was abundant evidence to warrant the finding that death was occasioned by means of wounds inflicted "with a heavy blunt instrument," of an unknown description.

3. It is urged that the court committed error in refusing to instruct the jury as requested by the defendant upon the subject of the *corpus delicti*. Counsel argues that there was evidence tending to show that death was occasioned by a severe fall which the deceased had sustained on the night in question, and not by the means charged in the information, and that it was the defendant's right to have the jury instructed upon any theory of the case having evidence in its support. Conceding the fact and the law to be as contended for by counsel, we think that no error was committed in refusing the particular instruction requested, because the subject matter was included in

and covered by the general charge in which the jury were told that if it was "possible to account for the death of the deceased upon any reasonable hypothesis other than that of the guilt of the defendant," then it became their duty to so account for and find the defendant not guilty. Also, that "if the jury entertained any reasonable doubt upon any single fact or element necessary to constitute the offense," it was their duty to acquit him.

4. It is complained that the court commented upon the evidence in instructing the jury with reference to the credit to which the respective witnesses were entitled. The particular language complained of is in these words: "And in the case of the defendant you have the right to consider the great interest he has in the result of your verdict." An instruction in the language here complained of was expressly upheld by this court in *State v. Nordstrom*, 7 Wash. 506 (35 Pac. 382), and for the reasons there given the contention of counsel cannot be sustained.

5. It is further complained that the jury erred in finding the defendant guilty of murder in the first degree. This claim proceeds upon the theory that the defendant was intoxicated at the time when the offense was committed, if committed at all by the defendant. At the request of the defendant the court correctly instructed the jury as to how intoxication should be regarded by them in determining the degree of defendant's guilt, (in the event that they should find that he was intoxicated). It was for the jury under such instruction to determine the fact, and their finding is not without sufficient evidence to support it.

6. It is also urged that the verdict is contrary to the evidence. We think this claim cannot possibly be maintained without disregarding a very great deal of

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uncontradicted and competent evidence adduced at the trial. The record shows that the appellant had, for several years prior to the time of the homicide, which occurred (as is charged) on Christmas of 1895, followed the occupation of a fisherman; that for some months prior to that date the defendant had been living with the deceased—an Indian woman—occupying a shack or floathouse, built upon a scow, moored at a point on the shore of the Duwamish river distant about two miles from where it empties into Puget Sound. On the afternoon or evening of the 24th day of December, 1895, the defendant and deceased left their place of abode and went in a row-boat to the home of William Dobson and wife (the latter being a sister of the deceased) who lived in a shack upon the shore of Elliott bay in front of the city of Seattle, distant some five or six miles from the home of the defendant and deceased, already referred to. They remained at Dobson's until about eight o'clock Christmas night, during which time considerable beer and some whiskey was drunk, all hands participating. While at that place, as shown by the evidence, the defendant, prompted by jealous motives, rudely assaulted the deceased, striking her in the face and body with his clenched fist. About eight o'clock Christmas night the defendant and deceased got into their boat, ostensibly to go home. Prior to leaving, the defendant stated to John D. Frazer (one of the state's witnesses) who had been one of the company at the home of Dobson on that day, that he would "do her up that night," referring to the deceased. Before embarking the defendant rudely and forcibly lifted the deceased from the ground, carried her to the side of the boat, and roughly and violently threw her into its bottom. Some time after eleven o'clock of the same night the

defendant visited a saloon known as "The Exchange," situated near the water front between Dobson's house and the mouth of the Duwamish river, and about one mile from Dobson's house. He remained in the saloon only a short time, during which time he procured a dollar's worth of whiskey; and thereafter, returning to his boat, was seen to proceed in company with the deceased in the direction of their home. Mr. John O'Leary and J. W. Kerry testified that about midnight of the same night they saw out on the bay, at a considerable distance from the shore but within hearing, a row-boat occupied by two people going in the direction of Duwamish river. One of the occupants of the boat was striking the other occupant, who was seated at or near the stern, with something which he held in his hands; that they distinctly heard the sound of the blows and the screams and groans of the person who received them; that said boat proceeded on its course in the direction of the mouth of the Duwamish river. About two o'clock in the morning of December 26th, one Joseph Tulip, who resided with his wife and child in a cabin distant about fifty feet from the floathouse of defendant, was aroused by the defendant, who came to Tulip's house, stated that he had just returned from Seattle, and asked Tulip if he had seen anything of his wife (meaning the deceased), saying that she ought to have been there before him; that she had left him at Seattle at about eleven o'clock, and was to come home by way of South Seattle on a street car. He obtained permission to spend the remainder of the night at Tulip's. He also stayed there the next night. About noon of the 27th he informed Tulip that the woman was dead, and requested help to bury her. Tulip, suspecting foul play, declined to assist, and that night, while defendant was asleep, Tulip informed the

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officers, who proceeded to the house and arrested the defendant. Upon being arrested the defendant cursed Tulip and displayed much anger towards him. On the way to the jail the defendant remarked in substance two or three times, that he regretted that he had not killed Tulip instead of "the woman;" also that he wished he was going to be hung "for killing that s— of a b—, (referring to Tulip) instead of for killing the woman," and similar expressions. On the morning after arriving at the jail, the defendant disclosed, for the first time, the whereabouts of the body which was found in about eight feet of water, a rope attaching it to the end of defendant's float. The body was held under water by being fastened to a sack containing lead.

The autopsy disclosed the fact that life was extinct before the body was placed in the water, and that death resulted from concussion of the brain produced by blows upon the head from some blunt instrument. There were bruises and contusions upon the head, arms and hands.

Such, in brief, was the case made by the evidence introduced on the part of the state, and although the defendant became a witness in his own behalf and expressly asserted his innocence, the jury found him guilty of murder in the first degree. There was, we think, "a maturity of proof" to sustain the verdict, and we have been unable to discover any reason why it should be set aside and a new trial awarded.

The judgment of conviction is affirmed and the cause remanded to the lower court with directions to proceed to appoint a day for the carrying of its sentence into effect according to law.

HOYT, C. J., and ANDERS, DUNBAR and SCOTT, JJ.,
concur.

[No. 2386. Decided November 17, 1896.]

JOHN MEGRATH, *Respondent*, v. DAVID GILMORE *et al.*,
Appellants.

DECEASED JOINT DEBTOR — SURVIVAL OF LIABILITY — DEATH PENDING
APPEAL — SUBSTITUTION OF EXECUTORS — FAILURE TO PRESENT
CLAIM — VARIANCE.

Upon the death of a joint debtor, the right of action on the liability survives against his representatives.

Where, pending an appeal from a judgment, the appellant dies and his executors are substituted by stipulation, they cannot, on a retrial of the cause after reversal, demand a non-suit on the ground that the claim in action had never been presented to them as executors.

Failure to present a claim to the executors of one joint debtor will not release the other joint debtor, in cases where the law excuses, or does not require, presentment to the executors.

Where executors have been substituted as parties defendant in a cause by stipulation, it is unnecessary to file an amended complaint showing the death of the defendant and the appointment and substitution of his executors.

A defendant cannot urge a variance between the contract pleaded by plaintiff and the one offered in evidence, when the judgment is based on the contract pleaded by defendant in his answer.

Appeal from Superior Court, King County.—Hon.
THOMAS J. HUMES, Judge. Affirmed.

Burke, Shepard & McGilvra, and *Andrew Woods*, for
appellant:

The judgment should be reversed because of the failure of the lower court to grant defendant's motion for a non-suit as to the executors of William Kirkman, on the ground that there was neither averment nor proof that a claim against the estate of William Kirkman, deceased, based on the demand sued on in this action, had been presented to the executors of the

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estate, as required by law. *Steen v. Hendy*, 40 Pac. 21; *Lathrop v. Bampton*, 31 Cal. 18 (89 Am. Dec. 141); *Rowland v. Madden*, 72 Cal. 17; *Derby v. Jackman*, 89 Cal. 1; *Commercial Bank v. Slater*, 21 Minn. 172; *Bunnell v. Post*, 25 Minn. 380; *Fern v. Leuthold*, 39 N. W. 399; *Matthews v. Jones' Admr.*, 2 Metc. (Ky.) 254; *Willard v. Van Leeuwen*, 56 Mich. 15; *Dennis v. Sharer*, 56 Mich. 224; *Clark v. Davis*, 32 Mich. 154; *Graham v. Vining*, 2 Tex. 433.

There is no survival of liability against the representatives of a deceased joint debtor. *Bishop, Contracts*, § 863; 1 *Parsons, Contracts* (6th ed.), p. 29; *Trustees v. Lawrence*, 11 Paige, 80; *Slauson v. Schwabacher Bros. & Co.*, 4 Wash. 783 (31 Am. St. Rep. 948).

Stratton, Lewis & Gilman, and *Carr & Preston*, for respondent:

A cause of action against a joint contractor survives upon his death against his legal representatives. *Braxton v. State*, 25 Ind. 82.

The participation by an executor in litigation contesting a claim against his testator's estate is equivalent to a presentation and rejection of the claim. *In re Brennan's Estate*, 65 Cal. 517; *Strong v. Eldridge*, 8 Wash. 595.

The opinion of the court was delivered by

SCOTT, J.—This case was before this court upon a former occasion (10 Wash. 339, 39 Pac. 131), to which reference can be had for a statement of the nature of the action. Pending the former appeal, Kirkman died, and it was stipulated in this court that the executors of his will might be substituted as defendants in his stead. When the second trial was begun

the defendants moved to dismiss the action as against Kirkman's executors on the ground that there is no survival of liability against the representatives of a deceased joint debtor. This point has been passed upon by this court contrary to appellants' contention since his brief herein was filed. *Donnerberg v. Oppenheimer*, ante, p 290 (46 Pac. 254).

It is next contended that the court should have granted the defendants' motion for a non-suit as to the executors of Kirkman, on the ground that the claim had not been presented to said executors as required by §§ 986 and 988, Code Proc. (Volume 2 of the Code). Judgment had been obtained against Kirkman in the lower court during his lifetime. After the stipulation substituting his executors pending the appeal, they appeared herein and contested the same and obtained a reversal of the judgment, and ever since have been and are now contesting it, so there can be no substantial merit in this contention, and to sustain it would be inconsistent, at least, with the decision of this court in the case of *Strong v. Eldridge*, 8 Wash. 595 (36 Pac. 696).

The third point is disposed of in what has been said, as that relates to the claim of release of Gilmore on the ground that the executors of Kirkman were released by the failure to present the claim to them.

The fourth point is that the complaint does not state facts sufficient to constitute a cause of action against the executors of Kirkman, because it does not show Kirkman's death and the appointment and substitution of his executors; but we think this was immaterial, and that it was not necessary to file an amended complaint containing these formal allegations. The executors had in fact been substituted by the stipulation in this court.

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It is next contended that the plaintiff cannot recover on the ground of there being a fatal variance between the contract pleaded and the one offered in evidence; that the contract offered in evidence shows on its face that it is a contract by Megrath and Collins jointly as parties of the first part, and the contract pleaded was the contract of Megrath alone. As to this, it seems to us that the position of the respondent is sound. The defendants in their answer set up a contract between Megrath and Gilmore, in which it is admitted that the plaintiff alone is interested, and the plaintiff would be entitled to recover upon the contract so set up regardless of the complaint. The defendants should not be heard to complain of a judgment supported by a contract which they have pleaded in their answer, and furthermore, the law of the case on this point was settled by the former decision, where the cause was remanded for re-trial upon two separate questions, and wherein it was held that Collins signed the contract only as a surety for Megrath.

It is next contended that the court erred in admitting the testimony of Gilmore as to conversations with Kirkman, who was dead at the time of the trial. Nowhere in appellant's brief has attention been called to any part of the record containing such testimony, and the respondent denies that any such was introduced, and we pass the point without further comment.

The remaining points urged relate to the sufficiency of the evidence and to the instructions which were requested and refused. After an examination of the evidence we think it was entirely sufficient to sustain the verdict, and the point involved in the first instruction refused has been disposed of in what we have

previously said. All that the defendants were entitled to under the contract and the proofs in the remainder of the instructions requested, was fully covered in the charge given the jury.

Affirmed.

HOYT, C. J., and ANDERS, DUNBAR and GORDON, JJ.,
CONCUR.

[No. 2227. Decided November 18, 1896.]

THE STATE OF WASHINGTON, *Respondent*, v. W. B.
WITHEROW *et al.*, *Appellants*.

CRIMINAL LAW—WHEN ERRONEOUS INSTRUCTIONS HARMLESS ERROR.

In a criminal prosecution, in which the only testimony introduced is on the part of the state, and there is no substantial conflict in that, but the proofs conclusively show the guilt of the defendant, errors committed in charging the jury are without prejudice.

Appeal from Superior Court, Spokane County.—
Hon. NORMAN BUCK, Judge. Affirmed.

Fitzgerald & Hopkins, and *A. M. Winston*, for appellants.

J. W. Feighan, Prosecuting Attorney, for The State.

Per Curiam.—The defendants were convicted of the crime of grand larceny and have appealed. Several questions were raised as to the sufficiency of the evidence relating to the proof of venue and the ownership of the goods, but the record discloses that there was proof showing that the goods were taken within the jurisdiction of the court, and sufficient proof of the ownership to sustain the verdict.

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Syllabus.

It is further contended that a motion for a continuance made by the defendants should have been granted, but we find nothing to show that the court abused its discretion in denying the same.

It is contended that certain of the instructions were erroneous, but it appears that the only testimony introduced in the case was upon the part of the state. Several witnesses were sworn who testified that the defendants admitted stealing the goods from a freight car on the Northern Pacific Railroad, and the goods were found in their possession. There was no substantial conflict in the testimony upon the part of the state either in the direct or cross examinations, and the proof conclusively showed that the defendants were guilty of the crime with which they were charged.

This being so, there was but one verdict that the jury could have rendered, and that was to find the defendants guilty, and if there was any error in the instructions, it was clearly error without prejudice. *Territory v. Gay*, 2 Dak. 125 (2 N. W. 477).

The judgment of conviction must be affirmed.

[No. 2304. Decided November 18, 1896.]

FRED D. BARTO, *Receiver, Respondent*, v. R. NIX *et al.*,
Appellants.

PLEADING — DUPLICITY — CORPORATIONS — RIGHT TO RECEIVE OWN
STOCK IN PAYMENT OF DEBT — RECEIVER — ACTION ON STOCK SUBSCRIP-
TIONS — ESTOPPEL — RES JUDICATA.

Were a complaint sets forth facts tending to show a liability both in tort and on contract, such recital is not open to objection on the ground of stating more than one cause of action, when such facts

15	563
d20	15
15	563
f22	185
15	563
e32	347
d32	348

all relate to a single transaction and are relied upon as the basis of a single cause of action.

A judgment against stockholders of a bank for the recovery against them of their contingent liability over and above the par value of their stock cannot be pleaded as *res judicata* in an action by the receiver of the bank to recover unpaid subscriptions to the amount of the par value of the stock.

A corporation has authority to receive from a stockholder his certificates of stock in payment of his indebtedness to it, when such transaction is *bona fide* and for the purpose of protecting the corporation from loss; and stock so taken may be re-issued by the corporation.

In an action by a receiver of a bank to enforce stock subscriptions, the defendants, who were directors in the bank, are estopped from setting up that the bank stock had been issued by the bank to them and their notes taken therefor, under a secret agreement that they should not be liable thereon.

Where, in an action for the appointment of a receiver for a corporation, the court had determined that unpaid assessments upon the capital stock should be collected, it must be presumed, in an action brought by the receiver for their collection, that such determination was necessary and rightful, although from the record in the original action it may appear that the assets of the bank were sufficient to discharge its indebtedness.

Appeal from Superior Court, Pierce County.—Hon. W. H. PRITCHARD, Judge. Affirmed.

John Paul Judson, for appellants.

Remington & Reynolds (John A. Shank, of counsel), for respondent:

A corporation may become the owner of its own stock if taken in good faith in payment of a pre-existing debt. 2 Thompson, Corporations, § 2068; *Yeaton v. Eagle Oil, etc., Co.*, 4 Wash. 183; *Commonwealth v. Boston, etc., R. R. Co.*, 142 Mass. 146; *Williams v. Savage Mfg. Co.*, 3 Md. Ch. 418; *City Bank of Columbus v. Bruce*, 17 N. Y. 507; *State Bank v. Fox*, 3 Blatchf. 431; *State v. Smith*, 48 Vt. 266.

Nov. 1896.] Opinion of the Court—Hoyt, C. J.

The secret trust between appellants and the banks does not relieve them from liability. The statute relating to stock held in trust was not intended to apply to secret or colorable trusts, where there was no *cestui que* trust and no fund answerable to creditors, but such a trust will be set aside or disregarded as a fraud upon creditors. *Hospes v. Northwestern Mfg. & Car Co.*, 48 Minn. 174; *Gogebic Investment Co. v. Iron Chief Mining Co.*, 78 Wis. 427 (28 Am. St. Rep. 417); *Sawyer v. Hoag*, 17 Wall. 610; *Union Mutual Ins. Co. v. Frear Stone Mfg. Co.*, 97 Ill. 537 (37 Am. Rep. 129); *Melvin v. Lamar Ins. Co.*, 80 Ill. 446 (22 Am. Rep. 199); *Scovill v. Thayer*, 105 U. S. 143; *First National Bank v. Gustin; etc., Mining Co.*, 42 Minn. 327 (23 Am. St. Rep. 510); *Boulton Carbon Co. v. Mills*, 78 Iowa, 460; *Elyton Land Co. v. Birmingham, etc., Elevator Co.*, 92 Ala. 407 (25 Am. St. Rep. 65); *In re Reciprocity Bank*, 22 N. Y. 9; *Farmer's, etc., Bank v. Jenks*, 7 Metc. (Mass.) 592; *Nathan v. Whitlock*, 9 Paige, 152; *Mann v. Cooke*, 20 Conn. 178; *Sagory v. Dubois*, 3 Sanf. Ch. 466; *Baines v. Babcock*, 95 Cal. 581 (29 Am. St. Rep. 158); *Allibone v. Hager*, 46 Pa. St. 48; *Marshall Foundry Co. v. Kilian*, 99 N. C. 501 (6 Am. St. Rep. 539).

The opinion of the court was delivered by

HOYT, C. J.—In 1890 the Bank of Puyallup was organized under the laws of the state with a capital stock of \$100,000, divided into one thousand shares of \$100 each. This stock was all subscribed for and sixty per cent. paid thereon before any business was transacted. A. C. Campbell was the owner of two hundred shares of this stock, and on the 13th day of November, 1891, he transferred one hundred and ninety-nine shares directly to the bank and received a credit of \$14,000 therefor on the books of the bank, to which

he was then indebted; and the bank thereupon attempted to cancel these certificates of stock. Thereafter it was thought necessary by the officers of the bank that these one hundred and ninety-nine shares of stock should be held by some one, and it was agreed that they should be re-issued to J. P. Stewart and Willis Boatman, who were to give their promissory notes for seventy per cent of the face value of this stock. This was done and the stock so issued held by them until 1892, when it was by them surrendered to the bank and the certificates evidencing their ownership canceled; and it was then agreed that this stock should be re-issued to the directors of the bank, each to receive the number of shares then agreed upon. The certificates, in accordance with this agreement, were issued to the several defendants, who each gave to the bank his note for seventy per cent. of the face value of the stock. This stock so issued to these defendants was held by them until June, 1893, at which time the bank was declared insolvent and its assets placed in the hands of a receiver for the purpose of closing up its business. In the action in which the receiver was appointed it was determined by the court that the assets in the hands of the receiver were insufficient to pay its indebtedness, and such receiver was directed to levy an assessment upon the stockholders for the amounts unpaid upon their several stock subscriptions. In pursuance of this order assessments were duly levied upon the several defendants in this action for the full amount of the par value of the stock standing in their name, which had been issued to them as hereinbefore stated, and due notice thereof given. Thereafter such assessments not having been paid, this action was brought to enforce payment.

The first assignments of error are founded upon the rulings of the court in settling the pleadings, and all relate to the alleged claim that the second amended complaint stated more than one cause of action, and that the several causes of action were not separately stated. This complaint simply set out in an orderly manner a statement of the facts relating to the transaction which was relied upon to show that the plaintiff was entitled to recover a judgment against the defendants; and while some of the facts so alleged may have tended to show that a contract was entered into between the bank and the defendants, and others to show wrongful action on the part of the defendants and the bank, they all related to a single transaction and were properly included in a single count. Whether a claim of relief is rightfully founded upon a contract relation entered into, or wrongful acts done, where but a single transaction is relied upon, the recital of the facts relating to such single transaction is not open to objection, for the reason that such recital may tend to show a liability upon contract and also in tort. The facts as to such single transaction having been set out, it is for the court to say whether or not they constitute a cause of action. Such being the rule, there was no foundation for the claim that there had been any such change of the cause of action in the several complaints as to justify the court in granting defendants' motion to strike.

The question raised by the demurrer to the second amended complaint is so connected with questions growing out of the trial that a separate discussion is not necessary. Something is said in the brief as to the right to trial by jury, but since no error is assigned upon the action of the court in refusing a jury trial, that question cannot be here considered.

It appeared that, at the time this stock was issued to the defendants, there was an agreement between them and the bank that they should never be called upon to pay the notes which they had given for seventy per cent. of its par value, nor held liable in any manner by reason of the fact that such stock was issued to them and carried in their name; and upon this agreement and the fact that the stock issued to the defendants had been theretofore issued to Campbell and by him transferred to the bank in payment of his indebtedness thereto, are founded the principal claims of defendants for a reversal of the judgment.

One other ground is somewhat relied upon, and that is that a judgment had been rendered in another action against these defendants and other stockholders, for the amount due upon the stock severally held by them. But a comparison of the record in that case with the one in the case at bar will clearly show that the liability for which that judgment was rendered was a different one from that for which it was sought to recover in this action. This suit was to recover for an unpaid subscription to the amount of the par value of the stock. The other was to recover the contingent liability over and above the par value of the stock, provided for in the constitution. Beside, that judgment was not at the time it was offered in evidence a final one. An appeal therefrom had been taken to this court, upon which the judgment has been reversed and the proceeding dismissed.

The appellants earnestly contend that, under our statutes, the bank had no authority to take the stock of Campbell in payment of his indebtedness to the bank. It may be conceded that a corporation in this state cannot traffic in its own stock. Such we believe to be the rule established in all the states having sim-

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ilar statutory provisions. But it does not follow that it may not receive such stock in payment of the indebtedness of one of its stockholders, when such transaction is *bona fide* and for the purpose of protecting the corporation from loss. In our opinion the transaction between the bank and Campbell was authorized and thereby the bank became the owner of the stock in question, and had the right to re-issue it. But whether it did or not, these defendants, who were the managers of the bank, cannot defend upon the ground that what was done was not authorized by law.

The other material question grows out of the secret agreement between the defendants and the bank, to the effect that they should incur no liability by reason of the stock being issued to them. Relating to this question the trial court found as a fact that this was done for the purpose of giving credit to the bank and that, by reason of the credit so given, its creditors, represented by the receiver, were induced to give it their business. This finding of fact is excepted to by the appellants on the ground that it was not sustained by the evidence, but this exception was not well taken. The fact of the stock having been issued and the notes having been taken therefor would require that such notes should be carried as a part of the assets of the bank, and there would be at least an apparent liability upon the part of the holders thereof for the remainder of its par value. This being so, the law would presume, in the absence of any proof as to the object of the transaction, that it was for the purpose of having the books show that the bank was in a better condition than it would have been if such stock had not been re-issued. Beside, there was direct proof that it was understood that it was necessary that

this stock should be issued to somebody in order that the bank might be in such a condition that an examination of its books would not discredit its standing. Such being the object for which this stock was issued to the defendants, it might well be questioned whether they could set up this secret contract between them and the bank in an action brought by the bank itself to recover the par value of the stock. The contract was clearly an illegal one, and there might be reason for holding that the transaction must be treated as though this secret illegal agreement had never been entered into.

But it is not necessary here to decide that question. This action is in the name of the receiver who represents both the bank and its creditors, and as between the creditors and these defendants it is clear that this secret agreement, by which it was sought to change the liability of the holders of this stock, was without any force whatever. To hold that one could have stock issued to him and allow the same to stand in his name upon the books of the bank, and yet by a secret agreement with such bank be released from all liability growing out of the issue of such stock, would be contrary to the provisions of our statutes and to public policy. This would be true even if the person to whom the stock was issued was a stranger to the corporation at the time of its issue; and where, as in the case at bar, the stock was issued to the directors of the bank, who must be presumed to know its condition and the purpose of the issue, the reason for holding them liable is much greater. A director is an officer of the bank, and it is through the board composed of himself and his associates that its business is transacted. To hold that one of these can make a note to the bank and have it taken up as a part of its

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assets and afterwards, when such note is sought to be enforced against him in the interest of the creditors of the bank, set up a secret agreement which nullifies the note, would be contrary not only to all legal rules but to every principle of justice. And the rule which would apply to a note so made and executed would apply to the liability created by the holding of stock issued under the circumstances disclosed by this record.

The only other reason suggested why the judgment should be reversed, which we think it necessary to notice, is that it appeared from the record in the action in which the receiver was appointed that the assets of the bank were sufficient to discharge its indebtedness. But that fact, if fact it was, was immaterial under the issues in this action. The court in that cause had determined that it was necessary that the unpaid assessments upon the capital stock should be collected, and it must be presumed that this determination was necessary and rightful.

We find no error in the record, but even if there were technical error, it did not affect the rights of appellants, for the reason that the facts as stated in their own brief show that the judgment was what it should have been.

Judgment affirmed.

DUNBAR, ANDERS, SCOTT and GORDON, JJ., concur.

15	572
16	421
15	572
37	271

[No. 2351. Decided November 18, 1896.]

THE CITY OF BALLARD, *Appellant*, v. WEST COAST IMPROVEMENT COMPANY, *Respondent*.

ASSESSMENTS FOR STREET IMPROVEMENTS—ACTION BY CITY—LIMITATIONS.

Where a municipal corporation has brought an action to foreclose street assessments on the theory that they had been levied by a duly organized and existing municipality, it cannot, in order to avoid the bar of the statute of limitations to its action, assume the position that its incorporation was void at the time of the levy of the assessment, and that the statute did not begin to run against it until the taking effect of a subsequent law validating the attempted incorporation which had authorized the levy.

An action to foreclose a street assessment, not brought by the city within two years of its delinquency, is barred by the statute of limitations.

Appeal from Superior Court, King County.—Hon. J. W. LANGLEY, Judge. Affirmed.

Elwood Harshman, and *P. V. Davis*, for appellant.

Donworth v. Howe, for respondent.

The opinion of the court was delivered by

GORDON, J.—This action was commenced by the appellant city to foreclose two street assessment liens against the property of the respondent. Summons was served on the 9th of August, 1894. The ordinance under which the first assessment was laid was passed and approved July 15, 1890, and the complaint charges that the improvement was made between August, 1890 and the 4th of June, 1891. The ordinance under which the second assessment was laid went into effect July 15, 1890, and the complaint shows the improvement to have been made prior to the second day of June, 1891.

The answer of the defendant set up three independent defenses to each cause of action, one of such defenses being that the cause of action did not accrue within two years prior to the commencement of the action. From a judgment of dismissal, "without prejudice to whatever rights the plaintiff may have to make a re-assessment and to the laws relating to re-assessment," the city has appealed.

The judgment appealed from recites that—

"The plaintiff in making its opening statement, stated by its counsel that the assessment alleged in the first cause of action in the complaint, *became delinquent on August 19, 1891*, and that the assessment stated in its second cause of action alleged in the complaint, *became delinquent on August 10, 1891*, whereupon it was agreed in open court by the counsel for the respective parties, that the question whether said action was barred by the statute of limitations should be determined by the court from said admission and from the files and records of the cause, and that no evidence should be introduced unless the court should adjudge that said action was brought within the time limited by law, and thereupon said cause was argued by counsel. . . . The court now finds that this action was commenced more than two years after said dates of delinquency and more than two years after said several causes of action accrued, if in fact the same ever did accrue" —

and concludes that the causes of action were barred by the statute.

The appellant does not seriously contend that this ruling was incorrect, if it be ascertained that the city was legally incorporated at the time when the assessments were laid. The first affirmative defense set out in the answer is that the territory comprised within the corporate limits of the appellant city was incorporated in accordance with an act of the legislature of the

territory of Washington, approved February 2, 1888 (Laws 1887-8, p. 221); that thereafter, in accordance with the provisions of §§ 4, 5 and 6, of an act entitled "An act providing for the organization, classification and incorporation and government of municipal corporations and declaring an emergency," approved March 27, 1890 (Laws 1889-90, p. 131), the inhabitants took steps to re-incorporate. The former of these acts was held unconstitutional in *Territory, ex rel. Kelly, v. Stewart*, 1 Wash. 98 (23 Pac. 405), and the sections above mentioned of the latter act were likewise held unconstitutional by this court in *Town of Denver v. Spokane Falls*, 7 Wash. 226 (34 Pac. 926). This branch of the answer proceeded upon the theory that the assessments in question were illegal, inasmuch as the plaintiff was not legally incorporated. The reply "denies each and every allegation [of said defense referred to] except that it admits that the City of Ballard, prior to the year 1890, was incorporated under and by virtue of and in accordance with the provisions of an act of the legislative assembly of the Territory of Washington . . . approved February 2d, 1888, and that thereafter in the year 1890, the said City of Ballard was incorporated under and by virtue of . . . an act . . . approved March 27, 1890."

The contention of appellant is that the causes of action set out in the complaint did not accrue until the taking effect of the act of the legislature of the state of Washington, approved March 9, 1893 (Laws 1893, p. 183), entitled, "An act to legalize and validate the incorporation or re-incorporation of towns and cities incorporated or re-incorporated under an act approved March 27, 1890," because at no time prior thereto was the appellant legally incorporated. For

Nov. 1896.]

Syllabus.

the purposes of this case, this latter question must be determined upon the record which the parties have made. We think the contention of appellant can not be sustained. The action was not brought upon that theory. The first allegation of the complaint is "That at all times hereinafter mentioned, plaintiff was and *is now a municipal corporation, duly organized and existing* under and by virtue of the laws of the state of Washington," and it was not permissible for it to abandon that theory and to claim a recovery upon an inconsistent one.

The recital in the judgment already referred to is that it was admitted in open court that the assessment laid in the first cause of action became delinquent on *August 19, 1891*, and that stated in its second cause of action became delinquent on *August 10, 1891*, and the lower court was clearly right in holding that the action was barred by the statute. *Spokane v. Stevens*, 12 Wash. 667 (42 Pac. 123).

Affirmed.

HOYT, C. J., and ANDERS, DUNBAR and SCOTT, JJ.,
concur.

[No. 2399. Decided November 18, 1896.]

THE CITY OF SEATTLE, *Respondent*, v. CHARLES PEARSON, *Appellant*.

CERTIORARI—WHEN LIES—PLEADING ORDINANCE—REGULATION OF
LIQUOR BUSINESS—VALIDITY OF ORDINANCE.

Certiorari will lie for the purpose of reviewing the action of a municipal court in a proceeding brought therein for the purpose of securing the conviction and punishment of one guilty of violating a city ordinance.

15	575
19	41

It is not necessary to plead an ordinance by title, number and date of passage in a complaint filed in a court of the municipality, as it is the duty of such court to take judicial notice of the ordinance.

The subject matter of an ordinance providing for the licensing of saloons is not in conflict with the subject matter of an ordinance regulating the hours during which saloons should be closed.

Where an ordinance consists of several and distinct parts, the fact that one of them is void will not render the whole ordinance void, if such void part can be eliminated without in any way destroying the efficacy or utility of the rest of the ordinance.

An ordinance fixing a minimum fine as the penalty for the commission of a misdemeanor, while the general misdemeanor law of the state fixes no minimum, is not void on that ground, as being in conflict with the general law.

Appeal from Superior Court, King County.—Hon. RICHARD OSBORN, Judge. Affirmed.

Melvin G. Winstock, for appellant:

The appellant urges that the ordinance is invalid for the reason that it prescribed a minimum penalty in direct conflict with § 301, Penal Code. *Petersburg v. Metzker*, 21 Ill. 205; *Bregguglia v. Lord*, 20 Atl. 1082; *Landis v. Vineland*, 23 Atl. 357; *Leland v. Long Branch Commissioners*, 42 N. J. Law, 375; *State v. Bringier*, 8 South. 298; *State v. Webber*, 12 S. E. 598.

John K. Brown, *F. B. Tipton*, and *Z. B. Rawson*, for respondent:

As to appellant's contention that the ordinance is in conflict with the general misdemeanor law of the state, in that the ordinance fixes a minimum penalty, while the statute does not, it is evident that while a few courts hold with appellant, the weight of authority and the better reason are against him. The minimum penalty provided in the ordinance is not unreasonable, and the legislature has never passed

Nov. 1896.] Opinion of the Court — DUNBAR, J.

any law on the subject in question. A municipal corporation may fix a minimum penalty for the violation of an ordinance, although the statute authorizing such ordinance fixes no minimum, provided such minimum is not unreasonable and not unjust or oppressive. *Kansas City v. Hallett*, 59 Mo. App. 160; *Board v. Giron*, 16 South. 190; *City of Pekin v. Smelzel*, 21 Ill. 464 (74 Am. Dec. 105); *Rogers v. Jones*, 1 Wend. 237 (19 Am. Dec. 419); *Mayor v. Allaire*, 14 Ala. 400; *Roberts v. Ogle*, 30 Ill. 459 (83 Am. Dec. 201); Sutherland, Statutory Construction, § 172 *et seq.*; Cooley, Constitutional Limitations, 239; 1 Beach, Municipal Corporations, §§ 89-91, and cases cited.

The opinion of the court was delivered by

DUNBAR, J.—The defendant (appellant in this case) was complained against in the municipal court of the city of Seattle for the violation of Ordinance No. 4151 of the said City of Seattle, which was an ordinance prescribing the limits of time within which intoxicating, malt, vinous, mixed or fermented liquors might be sold, and saloons and drinking places kept open in the city of Seattle, and providing penalties for the violation thereof. Under the provisions of this ordinance its violation is punished by a fine of not less than \$25 nor exceeding \$150, or by imprisonment for a period not exceeding thirty days, or by both such fine and imprisonment. And there is also a provision in the ordinance that any license for the sale of any such liquors, granted by the city of Seattle to any person convicted of violating any of the provisions of section one, (which section prescribes the time of closing), shall be forfeited and annulled by such conviction, without further action or pro-

ceedings of the city council or any other officer or department of the city.

The defendant was arrested, and demurred to the complaint upon statutory grounds, particularly contending that the ordinance under which he was complained against was invalid. The demurrer was sustained and the defendant discharged, whereupon the plaintiff, the city of Seattle, petitioned for a writ of *certiorari* to the superior court for King county, state of Washington. A motion to quash was introduced and overruled. Upon the argument of the question upon its merits as to the validity of the ordinance, the court held the ordinance to be valid in so far as the infliction of a fine and imprisonment was concerned, but invalid as to that portion which provides for forfeiture of the license. Judgment was rendered and an appeal taken to this court.

Respondent complains, and with some reason, we think, that the assignments of error are not clearly set forth in appellant's brief, but as no motion was made to strike the brief for that reason, we will consider it upon its merits.

The first contention of appellant is that *certiorari* does not lie in a case of this kind; that the ordinance, being *quasi* civil in its nature, the respondent, the city of Seattle, had a remedy by appeal. We think, under the best authorities, this is not a *quasi* civil action, but that it is either criminal or *quasi* criminal. This view is sustained by § 411, 1 Dillon on Municipal Corporations, (4th ed.) although there seems to be some conflict in the authorities cited. But under the provisions of ch. 54, Laws of 1891, p. 91, and of § 4 ch. 65, of the Laws of 1895. p. 115 and under the authority of *Woodbury v. Henningsen*, 11 Wash. 12 (39

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Pac. 243), we think it is clear that the writ was properly issued in this case.

The second contention of appellant, that the ordinance was not properly pleaded, is also answered by § 413, 1 Dillon on Municipal Corporations, (4th ed.), to the effect that it is not necessary to plead the ordinance. We think also that there was nothing in the further contention that this ordinance was in conflict with the subsequent ordinance. The subject matter of one was the licensing of saloons, and that of the other was the regulation of the hours during which they should be closed. They had no necessary relation to each other.

The most strenuous contention of the appellant is, however, that the lower court erred in holding that portion of § 2 of Ordinance No. 4151, which provides a forfeiture of the license, void, while it sustained that portion which provided for a fine and imprisonment for violating said ordinance. We are inclined to think that that portion which the court held to be void can be eliminated without in any way destroying the efficacy or utility of the rest of the ordinance. In *State v. Kantler*, 33 Minn. 69 (21 N. W. 856), where a charter authorized the penalty of fine and imprisonment, an ordinance imposing in addition thereto "costs of prosecution" was declared void as to such addition, but valid as to the remainder.

It cannot be said that the provision in regard to the revoking of the license has a general influence over that portion of the ordinance which fixes the penalty of fine and imprisonment, because such penalty could be imposed and enforced as fully without the additional imposition of revoking the license as with it. The fine and imprisonment are complete penalties within themselves, and are in no wise dependent upon

the subsequent provision of the ordinance with relation to the revocation of the license, and if this be true, the independent provision of the statute can be maintained, although the other part is held void. *Municipality v. Morgan*, 1 La. An. 111; *Ex parte Mayor, etc., of Florence*, 78 Ala. 419; *Rau v. Little Rock*, 34 Ark. 303. And in Wilcock on Corporations, 160, the rule is laid down that "if a by-law consist of several distinct and independent parts, although one or more of them may be void, the rest are equally valid as though the void clauses had been omitted." See, also, many other cases cited by 1 Dillon on Municipal Corporations, § 421.

We do not wish to be understood as deciding now that any portion of the ordinance is invalid, for, as the case is presented to us, it is necessary to determine only the validity of that portion in regard to the penalty of fine and imprisonment.

We think there is no merit in the further contention that the ordinance in question is in conflict with the general misdemeanor law of the state. Beach on Public Corporations, §§ 89 and 90.

The judgment will be affirmed.

HOYT, C. J., and SCOTT, ANDERS and GORDON, JJ., concur.

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[No. 2132. Decided November 20, 1896.]

GEORGE BENNEY, *Appellant*, v. S. CLEIN *et al.*, *Respondents*.

VACATION OF JUDGMENT—EFFECT AS BETWEEN THE PARTIES—SALE OF PROPERTY UNDER—REPLEVIN—ESTOPPEL TO DENY PLAINTIFF'S TITLE.

Where a judgment has been vacated because of the irregularity of the plaintiff in obtaining it, it operates to avoid an execution sale made under it, as between the parties, and cancels the purchase by the execution plaintiff of the property sold.

An execution plaintiff who purchases the property levied on does not occupy the position either of an innocent purchaser or of a *bona fide* incumbrancer.

Where a plaintiff has purchased the defendant's property at execution sale under a judgment which has afterwards been vacated, he is estopped to dispute the defendant's title thereto in a subsequent action instituted by the defendant against him for the recovery of the property.

Appeal from Superior Court, King County.—Hon. RICHARD OSBORN, Judge. Reversed.

Charles F. Fishback (*Charles E. Shepard*, of counsel), for appellant.

Gill, Keene & Shaw, for respondents.

The opinion of the court was delivered by

GORDON, J.—This action was brought by the appellant for replevin of a certain frame building, with certain fixtures and furniture therein, of the total value of \$300. After certain formal allegations, the complaint alleges the recovery by the respondents, on about October 5, 1894, of a judgment against the appellant as garnishee in an action then pending in the superior court for King county, in which the respondents were plaintiffs, Wandschneider and Camp-

15	581
18	437
15	581
22	417
15	581
37	51

bell were defendants, and the appellant was garnishee; that on November 3, 1894, an execution issued on said judgment, under which the property which is the subject of this suit was levied upon and sold on November 14, 1894, to the judgment creditors in that action (respondents herein). The complaint further alleges that said judgment "was improperly and irregularly entered against this plaintiff [appellant here] as garnishee;" that thereafter, on January 8, 1895, the superior court vacated and set aside the judgment against the appellant as garnishee; a demand for the possession of the property, and an allegation of damage, by the detention, in the sum of \$250. A general demurrer was interposed to the complaint and overruled. Respondents thereupon answered, setting up, in addition to what has already been stated, that the respondents took possession of the property in suit and retain it by virtue of the purchase at the execution sale; that appellant had full knowledge of the sale and of all proceedings, and at no time made objection thereto; permitted it to go on without attempting to stay it, or to vacate the judgment until three months after possession of the property was taken by respondents; that respondents had appealed from the judgment of the superior court which vacated and set aside the judgment, and that the appeal was then pending. A demurrer to the answer was overruled and appellant (plaintiff below) replied, setting forth, among other things, that after the vacation of the judgment the action had been tried between the respondents (plaintiffs therein) and the appellant (garnishee therein), and resulted in a judgment in favor of appellant upon the merits. When the cause came on trial, the lower court, on respondents' motion, entered a judgment in

Nov. 1896.] Opinion of the Court — GORDON, J.

their favor upon the pleadings, and dismissed the action.

The question to be determined upon this appeal is the effect of the vacation of a judgment, after an execution sale of personal property, upon the title to the property sold thereunder and purchased by the execution plaintiff. The appellant insists that the order vacating the judgment, like the reversal of a judgment, operates to avoid a sale made under it, as between the parties, and cancels the purchase by the execution plaintiff of the property sold; and counsel have cited numerous authorities to the effect that a reversal of a judgment, as between the parties, is the same as if the judgment had never been; and by reversal the judgment ceases to be a justification (as between the parties) for any acts done by virtue of it before the reversal occurred.

Counsel for the respondents do not question the soundness of the rule relied upon by appellant in so far as it pertains to a case wherein judgment has been reversed, but insist that a different rule is applicable where the judgment has been vacated merely. The record in this case does not disclose the grounds upon which the judgment in the garnishment proceeding was vacated, but, as already noticed, the complaint in this case alleged that the judgment was "improperly and irregularly" entered; and while, strictly considered, this is the statement of a conclusion rather than of an issuable fact, it is, we think, at this stage of the proceedings, entitled to a liberal construction. So construed, it would appear that the entry of judgment was due to some irregularity upon the part of the plaintiffs in that proceeding, who subsequently became the purchasers of the property sold; and it will be presumed that the order vacating the sale was

granted because of such "irregularity," and not as a matter of grace or favor to the defendant therein.

Adopting this view, the case, we think, falls within the principle (already referred to) which governs in cases of reversal. We perceive no reason for distinguishing between a judgment which has been vacated because of the irregularity of the plaintiff in obtaining it, and a judgment reversed by an appellate court upon appeal, in so far as the rights of purchasers (other than third parties) are concerned.

Aside from the allegation of irregularity in entering the judgment, it was suggested by counsel upon the oral argument, and appears from the record in the original cause which was appealed to this court by the respondents herein (and the appeal thereafter dismissed), that the judgment was vacated and the default of the defendant therein (appellant here) set aside upon a showing that his answer in garnishment was duly served upon plaintiffs' counsel prior to the entry of default; and thereafter it was left with the clerk of the superior court to be filed, but the same was not filed because of the neglect to pay the filing fee. We are not at this time called upon to review the action of the court in setting aside the default and vacating the judgment entered therein. It has become final and is binding upon all parties to that proceeding. But we refer to it in this action for the purpose only of ascertaining whether the action of the lower court in that behalf was based upon the inadvertence or excusable neglect of the defendant against whom the default and judgment had been entered, or for irregularity upon the part of the plaintiff in procuring the judgment; and, as already noticed, the record referred to discloses that it was

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upon the latter ground that the relief was awarded in the lower court.

It appears that, in granting the motion to vacate and set aside the default and judgment referred to, the court directed "that the title of innocent purchasers and subsequent *bona fide* incumbrancers of the property heretofore purchased at the sale made by the sheriff of King county under and by virtue of executions heretofore issued herein be not in anywise disturbed or affected hereby; but that the status of property heretofore sold under and by virtue of an execution issued herein, and the title thereto of such innocent purchasers and *bona fide* incumbrancers be and remain as though this order had not been made." The respondents in this action are not in a position to avail themselves of this provision of the order. As execution plaintiffs they were neither "innocent purchasers" nor "*bona fide* incumbrancers."

Counsel for the appellant have urged in their brief that this court should not only reverse the judgment appealed from, but should direct that judgment be entered below in favor of appellant upon the pleadings. This is resisted by the respondents' counsel, who insist that they have a right in any event to put the appellant to proof of his title to the property in question. We think that respondents are not in a position to question appellant's title. They levied upon the property as the property of the appellant, and caused it to be sold as his property. They found it in his possession and are attempting to retain it upon the assumption that the title to it passed to them in virtue of the execution sale referred to. This, we think, should be held to estop them upon the question of ownership. But the answer does contain a sufficient denial of any damages arising from a detention

of the property, and to this extent the appellant would not be entitled to recover in the present condition of the pleadings.

The judgment will be reversed and the cause remanded for further proceedings in accordance with this opinion.

HOYT, C. J., and ANDERS, SCOTT and DUNBAR, JJ., concur.

[No. 2352. Decided November 21, 1896.]

R. J. HUSTON *et al.*, Appellants, v. CHARLES BECKER
et al., Respondents.

DISTRIBUTION OF DECEDENT'S ESTATE—POWER OF COURT TO CHARGE
WITH LIENS—CO-TENANCY—RECOVERY OF EXPENDITURES MADE BY
CO-TENANT.

A court exercising probate jurisdiction has no power to direct a distribution of a decedent's estate to the heirs, charged with a lien in favor of the administrator on account of money expended by him for the benefit of the estate.

A claim of one co-tenant against the others on account of expenditures made by him upon the common property of all, cannot be collected otherwise than by the retention of the property until it is paid.

Appeal from Superior Court, King County.—Hon. J. W. LANGLEY, Judge. Affirmed.

John E. Humphries, E. P. Edsen, and Relfe & McCutcheon, for appellants.

White, Munday & Fulton, and Stratton, Lewis & Gilman, for respondents.

The opinion of the court was delivered by

HOYT, C. J.—Prior to January 21, 1888, Charles

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Nov. 1896.] Opinion of the Court — HORT, C. J.

Becker and Katharina Becker, husband and wife, were the owners in fee simple of the land described in the complaint. On said day the wife died intestate and left as her only heirs at law her husband, Charles Becker, and their children. Thereafter, Charles Becker was appointed administrator of the estate of his deceased wife, and qualified and entered upon the discharge of his duties as such. He took possession of said real estate, improved the same and built upon the property lasting and valuable improvements; he also paid the expenses of administration.

On the 26th day of April, 1893, he filed a report in the superior court of King county, in which he asked that the amount expended in improving the land, as well as that paid for expenses of administration, should be allowed in the settlement of his trust. Thereupon such proceedings were had that it was found that such administrator was entitled to be credited with the amount so expended, and should be charged with something over \$1,600 for use and occupation of the premises, and judgment was entered declaring the balance a lien upon the whole of said real estate, and decreeing that one-half thereof should be a lien upon the interest of the children therein. Afterwards said Charles Becker sold and assigned all his right, title and interest in and to the said lien and decree to the plaintiffs.

In the first count of the complaint filed in this action these facts were alleged and a claim made that by the force of the judgment rendered in the probate proceedings the administrator was entitled to recover of the children the amount adjudged to be a lien upon their interest in the property, and to have such lien enforced, and for that purpose a partition of the

property decreed, and that, plaintiffs having purchased his rights, were entitled to the same relief.

For the second cause of action substantially the same facts were set up and thereunder it was claimed that the said Charles Becker, as tenant in common with the children, was entitled to have one-half of the expenditures made by him declared to be a lien upon their interest, and to have such lien enforced by a partition of the property, or otherwise, as the court might direct, and that plaintiffs were entitled to such relief by reason of having succeeded to the rights of said Charles Becker.

To this complaint a demurrer was interposed by the defendants and sustained by the court. The plaintiffs elected to stand upon their complaint and judgment was entered against them, from which they have prosecuted this appeal.

If the first count stated a cause of action, it is because the judgment entered in the superior court in the probate proceeding was final and binding upon the minor heirs of Katharina Becker. This judgment though in the superior court, was in a proceeding which authorized such court to exercise only probate jurisdiction. This being so, the judgment is void unless it is one that could be rendered by the court exercising such jurisdiction in the matter of the estate of Katharina Becker, deceased. But the object of the administration of such estate was not to incur indebtedness on its account or that of its heirs, but to provide for the payment of claims against such estate, and the distribution of the assets after such claims were paid, and unless this judgment can be fairly construed to have been for the purpose of accomplishing these objects, it was void and of no effect. A superficial examination of the judgment will show

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Opinion of the Court—Hoyt, C. J.

that, though it purported to be by way of approval of the final report of the administrator, it was rendered when it appeared from such purported final report that the estate was not in condition to be closed up and the property distributed. If the money expended by the administrator, as shown by such report or any part thereof, was a proper claim against the estate of the wife, it was the duty of the court to see that such claim was paid out of the property of the estate. It had no power to direct a distribution of the estate to the heirs charged with the lien in favor of the administrator on account of money expended by him for the benefit of the estate. So far at least as the judgment purported to create a lien upon the interest of the heirs in the property, described in the complaint, it was void. And, unless it appeared that plaintiffs had some interest in or lien upon the property, no right of action was shown.

The facts alleged to constitute the second cause of action were insufficient for the reason that the larger portion of the expenditures was not such as could be made by Charles Becker at the expense of his co-tenants, and that which was a proper charge could not be collected otherwise than by the retention of the property until it was paid. Besides, it may well be questioned whether a claim which one co-tenant might enforce as a lien against the interest of his co-tenant could be assigned and enforced by the assignee, who had no interest in the property.

We are unable to discover any theory upon which either of the counts stated a cause of action. The judgment will be affirmed.

DUNBAR, ANDERS and GORDON, JJ., concur.

[No. 2275. Decided November 23, 1896.]

W. C. JONES *et al.*, Respondents, v. WILLIAM M. WOLVERTON *et al.*, Defendants, CHARLES RUSSELL, Appellant.

APPEARANCE — WHAT CONSTITUTES — STIPULATIONS — PROOF OF SIGNATURES.

Under Laws 1893, p. 412, § 16, providing that a defendant may appear in an action by giving the plaintiff written notice of his appearance or by making any application for an order therein, a defendant must be held to have appeared when he has entered into a written stipulation agreeing to the transfer of the cause to another county for trial.

One who joins in signing a stipulation with the other parties in the action in effect authenticates the signatures of the others and is not in a position to dispute them and insist on the court's requiring proof of any of the signatures.

Appeal from Superior Court, Douglas County.—
Hon. WALLACE MOUNT, Judge. Appeal dismissed.

Blake & Post, for appellant:

The stipulation not only does not fall within the statutory definition of an appearance, but it does not constitute an appearance under the general rules of the law.

This court has held that where a defendant, cited to appear in an action before a justice of the peace, comes in and asks for a continuance for one day, and on the next day appears specially to object to the jurisdiction for certain irregularities, it is not such an appearance as would confer jurisdiction on the justice. *Nelson v. Campbell*, 1 Wash. 261; *McCoy v. Bell*, 1 Wash. 504. In *Steinbach v. Leese*, 27 Cal. 295, the giving of a notice of appeal was held not to constitute an appearance; so of endorsing admission of

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Opinion of the Court—SCOTT, J.

service on the summons, *First National Bank v. Rogers*, 12 Minn. 529 (97 Am. Dec. 239); so of giving bond to dissolve attachment, *Clark v. Bryan*, 16 Md. 171; so of giving attachment bond, *Coplinger v. Steamboat*, 14 Ind. 480; so of taking a deposition, *Scott v. Hull*, 14 Ind. 136; so of motion to set aside judgment, there being no personal service of process, *Lutes v. Perkins*, 6 Mo. 57; so of giving notice of retainer, *Vanderpoel v. Wright*, 1 Cow. 209. See, also, *Mann v. Carley*, 4 Cow. 148; *De Wandelaer v. Coomer*, 6 Johns. 328; *Higgins v. Beckwith*, 14 S. W. 931.

Graves, Wolf & Graves, and *Jones, Belt & Quinn*, for respondents:

The defendants Wolverton appeared in this suit, when they signed the stipulation providing for the time, place and manner of the trial. *Baisley v. Baisley*, 21 S. W. 29; *Kleinschmidt v. Morse*, 1 Mont. 100; *Hupfield v. Automaton Piano Co.*, 66 Fed. 788; *State, ex rel. Attorney-General, v. Messmore*, 14 Wis. 115; *Keeler v. Keeler*, 25 Wis. 525; 2 Enc. Pl. & Pr., p. 596.

The opinion of the court was delivered by

SCOTT, J.—The plaintiffs brought this action to foreclose a real estate mortgage, and from a judgment in their favor the defendant Russell has appealed. The respondents moved to dismiss the appeal on the ground that the appeal notice was not served upon the defendants Wolverton. This is conceded by the appellant, but it is contended that said defendants were not entitled to notice, and the question to be determined is whether they had appeared in the action.

The action was commenced in the superior court of Douglas county, and it appears that said defendants joined in a stipulation with the attorneys for the plain-

tiffs, and the attorneys for the defendant Russell, stipulating that the cause might be tried in Spokane county. Did this stipulation by them constitute an appearance in the action? The statute, (Laws 1893, p. 412, § 16), provides that

“A defendant appears in an action when he answers, demurs, makes any application for an order therein, or gives the plaintiff written notice of his appearance.”

It seems to us that, under the rule laid down by the majority of the court in the case of *Cornell University v. Denny Hotel Co.*, *ante*, p. 433, this stipulation constituted an appearance upon the part of the defendants Wolverton. It was a written notice of appearance in the action, of which the plaintiffs and defendant Russell had notice by joining therein. In order to constitute it a written notice of appearance it was not necessary that the writing should recite that said defendants appeared. The fact of participating in the proceedings was an appearance. It was also in effect an application for an order, for the cause could not have been transferred without an order.

Some question is made about the validity of such an order, but this seems to us to be immaterial in considering the question of an appearance or an application for an order.

It is further contended by the appellant that the court should not consider said stipulation as an appearance for the reason that it purports to be signed by the defendants Wolverton in person, and there was no proof of their signatures. Although the court will not take judicial notice of the signatures of parties and there must ordinarily be proof of their genuineness, the appellant is not in a position to insist upon that objection raised here, for he joined in

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the stipulation and thus in effect authenticated its genuineness.

Under the authority of the case cited, the appeal must be dismissed.

DUNBAR, ANDERS and GORDON, JJ., concur.

HOYT, C. J., dissents.

[No. 2289. Decided November 23, 1896.]

THE COUNTY OF CLALLAM, *Appellant*, v. MUSSENA J.
CLUMP *et al.*, *Respondents*.

APPEALABLE ORDER—GRANT OF NEW TRIAL—MOTION FOR BY BOTH
PARTIES.

Where both parties to an action move for a new trial and it is granted on the motion of one and denied on the motion of the other, neither party can appeal therefrom for the reason that the order must be held to have been granted at the request of each.

Appeal from Superior Court, Clallam County.—
Hon. R. A. BALLINGER, Judge. Affirmed.

James Stewart, and *J. T. Ronald*, for appellant.

A. R. Coleman, and *Trumbull & Trumbull*, for respondents.

The opinion of the court was delivered by

HOYT, C. J.—The issues made by the pleadings in this action were tried to a jury, which returned a verdict in favor of the plaintiff for a part only of its claim. The plaintiff made a motion to vacate and set aside this verdict for errors of law occurring upon the trial to which it had excepted.

Thereafter the defendants also moved for a new trial

for reasons set out in the motion. The two motions were submitted to the court without argument, and an order was made by it which in terms granted the motion of the defendants, and set aside the verdict, and overruled the motion of the plaintiff. From this order this appeal has been prosecuted.

We cannot go into the alleged errors discussed in appellant's brief for the reason that appellant is not now in a position to obtain any benefit from such errors, if errors they were. The order appealed from, though on its face purporting to grant the motion of the defendants only, and to deny that of plaintiff, in fact granted what each of the parties asked: that was, to have the verdict vacated and set aside. This being so, neither of the parties could appeal from such order for the reason that it must be held to have been entered at the request of each of them.

The order will be affirmed.

DUNBAR, SCOTT, ANDERS and GORDON, JJ., concur.

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[No. 2338. Decided November 23, 1896.]

GILBERT HUNT MANUFACTURING COMPANY, *Appellant*,
v. JOHN R. WHEELER *et al.*, *Respondents*.

ASSIGNMENT FOR BENEFIT OF CREDITORS — TITLE OF ASSIGNEE —
CHattel MORTGAGE — FORECLOSURE SUBSEQUENT TO ASSIGNMENT.

While an assignment transfers all of the property of an insolvent debtor to the jurisdiction of the court, it passes such property subject to all valid liens existing against it.

Where leave to foreclose a chattel mortgage has been granted by the court, upon the petition of the mortgagee subsequent to an assignment for the benefit of creditors, made by the mortgagor, it is error for the court to dismiss same on the motion of the assignee on the ground of the pendency of said assignment.

Nov. 1896.] Opinion of the Court—SCOTT, J.

Appeal from Superior Court, Garfield County.—
Hon. R. F. STURDEVANT, Judge. Reversed.

M. F. Gose, Thomas H. Brents, and Wellington Clark,
for appellant:

An assignment for the benefit of creditors passes just the interest of the assignor and nothing more. *Bierer v. Blurock*, 9 Wash. 63; *State, ex rel. Baum, v. Superior Court*, 14 Wash. 324; *State, ex rel. Hunt, v. Superior Court*, 8 Wash. 210; *Gammons v. Holman*, 11 Ore. 284; *Helms v. Gilroy*, 20 Ore. 517; *Hooven v. Burdette*, 153 Ill. 672; *Shad v. Livingston*, 31 Fla. 89; *Jannay v. Habbeler*, 14 South. 624; *Locket v. Robinson*, 31 Fla. 134; *Cohn v. Stringfellow*, 14 South. 286; *Prouty v. Clark*, 73 Iowa, 55; *Einstein's Sons v. Shouse*, 24 Fla. 490; *Sliker v. Fisher*, 45 N. J. Eq. 136; *Campbell, etc., Mfg. Co. v. Walker*, 22 Fla. 412; *Merwin v. Austin*, 58 Conn. 22; *Hawks v. Pritzlaff*, 51 Wis. 160; *Paine v. Sykes*, 16 South. 903; *Union Trust Co. v. Trumbull*, 137 Ill. 146; *Sandwich Mfg. Co. v. Wright*, 22 Fed. 631.

Whether appellant had or had not the right to bring and maintain this action without first obtaining leave to do so from the court in the insolvency matter, the obtaining of that leave by him dissipated all doubt and gave him the right and invested the court with the jurisdiction thereof, beyond all question, and the lower court erred in holding otherwise and dismissing the action. *Societe D'Epargues v. McHenry*, 49 Cal. 351; *McHenry v. La Societe Francaise D'Epargues*, 95 U. S. 58.

Ben F. Tweedy, for respondents.

The opinion of the court was delivered by

SCOTT, J.—Plaintiff brought this action to foreclose

a chattel mortgage. Subsequent to the making of the mortgage the mortgagor made an assignment for the benefit of his creditors to the respondent Brooks, which assignment proceeding was pending in the court where the action to foreclose the mortgage was brought. Prior to the bringing of the action the plaintiff petitioned said court, setting up its mortgage and the pendency of said assignment proceeding, for leave to bring said action to foreclose, and leave of court was duly obtained and the action instituted. Thereafter the assignee appeared in said suit and moved to dismiss the same on the ground of the pendency of said assignment, and the motion was granted and the cause dismissed. Whereupon plaintiff appealed.

It is contended by the respondents that the action of the court in dismissing the foreclosure suit was based upon the case of *Quinby v. Slipper*, 7 Wash. 475 (38 Am. St. Rep. 899, 35 Pac. 116), and that this court held in that case that all claims against the insolvent must be presented and prosecuted in such proceeding. But we do not so view the decision there rendered. That was an action to foreclose a mechanic's lien, which was instituted without asking or obtaining leave of court so to do. While we have held that an assignment transfers all of the property of the insolvent debtor to the jurisdiction of the court, regardless of whether it is mentioned or described in the deed of assignment, we have also held that the assignment only passes the interest of the assignor in his property, and that it is subject to all valid liens existing thereon. *Bierer v. Blurock*, 9 Wash. 63 (36 Pac. 975).

It appears in this case that the mortgagor had covenanted in said mortgage, in case of default therein or in case the property mortgaged was molested or inter-

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ferred with, or if the mortgagee should deem himself insecure, that the mortgagee should be entitled to take immediate possession of the property and to foreclose the mortgage, etc. A mortgagee of chattels might be willing to accept such security with a condition of the kind mentioned regarding possession, and might be unwilling to accept it without such condition, or if it was understood that the law required in case of foreclosure, where the mortgagor had made an assignment, that the foreclosure must await the determination of the insolvency proceeding and the possession of the property meanwhile be held by the assignee therein. The right of possession pending a foreclosure suit might be a valuable right. It might be that a mortgagee would be in a situation to take care of the property pending a proceeding to foreclose, much more cheaply and advantageously than the assignee in the insolvency proceeding could care for it, and the mortgage security preserved to that extent.

It is contended that the contractual right to take possession and foreclose, as contained in the mortgage, would authorize the mortgagee to proceed without presenting his claim and obtaining permission to prosecute it independently. But that question is not involved in this case. We see no reason why the substantial rights of the mortgagee can not be fully protected in the insolvency proceeding. If the validity of the mortgage is not contested, a sale of the property can be directed to take place without waiting for the termination of such proceedings, and the proceeds applied in satisfaction of the mortgage debt. Or in case the debt or the validity of the mortgage is disputed, that matter could be determined in such proceedings independently of the other matters involved in the assignment, and a sale then had. But in this instance the

court made no such order, but after a presentation of the petition authorized the institution of the action to foreclose; and we are of the opinion that the court had authority to do this, and that it was error, after the institution of such suit and the incurring of costs, to dismiss the same for the reason stated, even though the withholding or granting of leave to sue was a matter addressed to the discretion of the court.

Reversed and remanded for further proceedings.

ANDERS, GORDON and DUNBAR, JJ., concur.

HOYT, C. J., dissents.

[No. 2349. Decided November 23, 1896.]

THE STATE OF WASHINGTON, *Respondent*, v. WILLIAM J. HENDERSON, *Appellant*.

SALE OF ADULTERATED BUTTER—SUFFICIENCY OF COMPLAINT.

A complaint, under Laws 1895, p. 70, §5, making it unlawful for any person to sell any fat, oil or oleaginous substance or compound thereof, not produced at the time of manufacture from unadulterated milk or cream from the same, with or without harmless coloring matter, which shall be in imitation of yellow butter produced from pure unadulterated milk or the cream from the same, is not sufficient, when it fails to charge as a fact that the oleaginous substance and compound was not produced from unadulterated milk or the cream from the same.

Appeal from Superior Court, King County.—Hon. THOMAS J. HUMES, Judge. Reversed.

Charles E. Patterson, and *Fred H. Peterson*, for appellant.

A. W. Hastie, Prosecuting Attorney, and *W. W. Wilshire*, for The State.

Nov. 1896.] Opinion of the Court—Hoyt, C. J.

The opinion of the court was delivered by

Hoyt, C. J.—Appellant was convicted of a violation of the provisions of § 5 of the act of March 11, 1895 (Laws 1895, p. 70). This section makes it unlawful for any person to sell any fat, oil or oleaginous substance, or compound thereof, not produced at the time of manufacture from unadulterated milk or cream from the same, with or without harmless coloring matter, which shall be in imitation of yellow butter produced from pure unadulterated milk or the cream from the same. The charging part of the complaint, upon which the defendant was convicted, was that:

“Said defendant did unlawfully sell and deliver to one John Huffman, for twenty-five cents in lawful money, one roll containing two pounds of an oleaginous substance compounded and colored in imitation of yellow butter produced from pure unadulterated milk or the cream from the same, and said oleaginous substance and compound not having been produced directly and wholly at the time of the manufacture thereof free from coloration or ingredient that caused it to resemble yellow butter produced from unadulterated milk or the cream from the same.”

It is claimed by appellant that this complaint fails to state the necessary facts to constitute a crime under the section of the statute above referred to. That it is necessary the complaint should show that the oleaginous matter had been produced or colored so as to imitate yellow butter manufactured from unadulterated milk or the cream from the same, and that said oleaginous substance was not produced at the time of its manufacture from unadulterated milk or the cream from the same, is clear from the language of the section. Are these facts charged in the complaint above set out?

The first one undoubtedly is, but we are unable to find that the second necessary element has been stated as a fact in the complaint, or that any words have been used from which such fact must necessarily be inferred. If the word "produced," where it last appears, had been omitted from the complaint, it might be inferred that it was intended to state as a fact that the oleaginous substance and compound was not produced from unadulterated milk or the cream from the same; but with that word in the situation in which it is found it is not made to appear that such was the intention of the pleader. In fact, a contrary intention is made fairly to appear. The use of such word connects what follows, "from unadulterated milk or the cream from the same," directly with the "yellow butter produced from pure unadulterated milk or the cream from the same," above stated in the complaint, and is but a repetition of what had been before stated, and more nearly refers to the real butter of which the substance sold was an imitation than to the substance itself; and for that reason there is no statement in the complaint that the imitation was not produced from unadulterated milk or the cream from the same. But, we have seen, one of the necessary elements of the crime was that the oleaginous substance sold should not be produced from pure unadulterated milk or the cream from the same; hence, the complaint failed to charge one of the facts necessary to constitute the crime. It is therefore insufficient to sustain a conviction, especially as it was timely moved against in the lower court.

This conclusion makes it unnecessary for us to discuss the other questions raised by the appeal.

The judgment and sentence will be reversed and

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Syllabus.

the cause remanded with instructions to dismiss the proceeding.

DUNBAR, ANDERS, GORDON and SCOTT, JJ., concur.

[No. 2375. Decided November 23, 1896.]

THE CITY OF OLYMPIA, *Appellant*, v. HAZARD STEVENS,
Appellant.

TAXATION—FORECLOSURE OF LIEN—INSUFFICIENCY OF ASSESSMENT
ROLL—ILLEGAL VALUATION—EVIDENCE.

Seem, that a defendant cannot raise an objection to the sufficiency of an assessment roll in a suit for foreclosure of a tax lien, although he has entered a plea of general denial, when he has also in an affirmative defense set up facts inconsistent therewith.

An assessment roll, which is sufficient to authorize the proper officer of the city to collect the taxes is, *prima facie* sufficient to authorize the court to decree foreclosure for non-payment of such taxes.

A finding that a board of equalization had raised the valuation of city property to a higher sum than they considered it worth, is not warranted by evidence tending to show that the valuation placed on the property by the assessor was nearer its cash value, and that several members of the board had made statements to the effect that it was necessary to place a high valuation upon the property of the city to enable it to meet necessary obligations, when the positive evidence of the members of the board is that they had no intention of raising the value of property beyond what was believed to be its cash value.

No question of fact as to the valuation placed on property can be raised in an action to foreclose a tax lien thereon, unless it is first shown that the action of the board of equalization in valuing it was illegal or fraudulent.

Appeal from Superior Court, Thurston County.—
Hon. T. M. REED, JR., Judge. Reversed.

A. J. Falknor, and Preston M. Troy, for appellant.

Charles H. Ayer, Charles M. Dial, and George Donworth, for respondent.

The opinion of the court was delivered by

HOYT, C. J.—This action was brought to foreclose the lien upon the property of the defendant, created by certain taxes which it was alleged had been assessed against it. After certain denials, the defendants set up two affirmative defenses; the first founded upon the claim that the assessment roll had not been properly certified, and the second upon the allegation that the board of equalization had, in pursuance of an illegal combination, fraudulently raised the value of the property as returned by the assessor; that the increase of valuation was not for the purpose of equalizing the value of the property of the city, but for the purpose of increasing its total valuation, to the end that larger indebtedness might be incurred. Trial was had and the conclusion reached by the court that the assessment was sufficient, and that such amount of the taxes as would have been properly levied upon the values returned by the assessor were a lien upon the property, and that therefore the city was entitled to a decree of foreclosure; but that the action of the board of equalization in raising the value returned by the assessor was illegal, and that the taxes levied upon such increased amount could not be collected.

Each of the parties appealed to this court, and these appeals present two questions for consideration, one upon the appeal of the defendant which grows out of the action of the court in denying his motion for a non-suit at the close of plaintiff's case; the other upon the appeal of the plaintiff which challenges the sufficiency of the evidence to sustain the finding to the effect that the board of equalization had acted fraudu-

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lently or illegally in raising the valuation made by the assessor. Upon the first question defendant contends that the motion for non-suit should have been granted for the reasons, (1) that the assessment roll offered in evidence was not sufficiently identified or authenticated; (2) that such roll, if regular, was not sufficient to show that the taxes had been levied as set out therein. The trial court found as a fact that the roll had been properly identified, and that the certificate thereto was sufficient, and there was, in our opinion, sufficient evidence to sustain this finding.

As to the second reason, it might well be held that defendant was not in a situation to avail himself of the insufficiency of the proof of the levy of the assessment, if such insufficiency existed. For while it is true that there were general denials contained in his answer, some of them at least were inconsistent with the facts set up in the affirmative defenses.

But, in our opinion, the proofs upon the part of the plaintiff were sufficient to establish at least a *prima facie* case. Under the ordinances which were introduced in evidence, and the statutes in force relating to the assessment and collection of taxes in cities of this class, the assessment roll, when regularly certified, was sufficient to authorize the collection of the taxes assessed against the property therein named; and if it was sufficient to authorize the proper officer of the city to collect the taxes, it was *prima facie* sufficient to authorize the court to decree foreclosure for non-payment of such taxes. Especially is this true when taken in connection with the other proofs offered on the part of the plaintiff.

To show improper action on the part of the board of equalization, evidence was introduced which tended to show that the valuation made by the assessor was

nearer the cash value of the property than the valuation placed thereon by the board of equalization, and that statements had been made by three or four of the members of such board to the effect that it was necessary to place a high valuation upon the property of the city to enable it to meet necessary obligations.

It is not necessary to decide the effect of statements by the members of the board that such board would raise the value of the property beyond what was believed to be its cash value, for the reason that none of the statements proven fairly warrant the assumption that any such action was intended. The statements testified to did not show any such illegal intention. The most that they tended to show was that, by reason of the financial condition of the city, it was necessary that its property should be kept at a high valuation, and there was not a suggestion even that, for that or any other reason, it was the intention of the board to value the property at a higher sum than they considered it to be worth. But even if some of the statements would have warranted the inference that such was the intention, it was at most but a rebuttable inference, and was so clearly overcome by the positive evidence of the members of the board as to their action that a finding in accordance with such inference cannot be allowed to stand.

It will not do to convict public bodies, the members of which are acting under the sanction of an oath, of improper action, without proof which can be fairly explained upon no other hypothesis than that of such improper action. The facts shown by the evidence, construed most strongly against the board, can all be harmonized with proper action on their part, and this being so it must be so harmonized. That part of the proof which tended to show that the value of the

property was less than that placed upon it by the board of equalization was without force, except that, in connection with other facts, it might have had a tendency to show fraudulent action on the part of the board of equalization. No question of fact could be presented as to the value placed upon the property unless it was first shown that the action of the board in valuing it was illegal or fraudulent. In our opinion the city made out a *prima facie* case, and it was not overcome by the proof offered on the part of the defendant.

The judgment will be reversed and the cause remanded with instructions to enter a decree as prayed for in the complaint.

DUNBAR and ANDERS, JJ., concur.

GORDON, J., concurs in the result.

[No 2219. Decided November 24, 1896.]

THE PENN MUTUAL LIFE INSURANCE COMPANY, *Respondent*, v. WILLIAM H. FIFE *et al.*, *Appellants*.

ASSIGNMENT FOR BENEFIT OF CREDITORS — LEAVE TO MORTGAGEE TO SUE
— DISCRETION OF COURT — COLLATERAL ATTACK.

Although an assignment for the benefit of creditors has been made by a mortgagor, it is a matter within the discretion of the court, to grant leave to the mortgagee to institute a separate suit for foreclosure.

The action of the court in assignment proceedings in granting leave to a mortgagee of the assignor to bring a separate suit for foreclosure cannot be collaterally attacked in the foreclosure proceeding.

Appeal from Superior Court, Pierce County.—Hon. W. H. PRITCHARD, Judge. Affirmed.

Parsons, Corell & Parsons, for appellants.

Doolittle & Fogg (*Charles O. Bates*, of counsel), for respondent.

The opinion of the court was delivered by

DUNBAR, J.—This action was brought upon a promissory note given by the defendants William H. Fife and Harriet A. Fife, his wife, to the plaintiff, respondent here, secured by a mortgage upon real property, for the foreclosure of the mortgage. Subsequent to the execution of the mortgage Fife and wife assigned all their property for the benefit of creditors, one of the appellants, Zephania J. Hatch, being appointed by the court assignee of the estate. Notice to all the creditors was duly made and published by the assignee, and subsequent to the assignment the respondent appeared in the assignment proceeding, which was No. 11,826 in the superior court, and filed a petition for leave to sue the assignee and foreclose his mortgage. Leave was granted by the court and this action was accordingly brought. Judgment of foreclosure was pronounced and from such judgment an appeal is taken here.

The judgment is simply a judgment of foreclosure without any personal judgment. It is contended by the appellants that the court acted without jurisdiction in granting leave to foreclose the mortgage by a separate suit, and many cases are cited from this court to sustain the view that the respondent's remedy was exclusively in the assignment case. We do not think that the cases cited are in point, as in none of them had the mortgagee obtained the leave of the court to sue. In fact, in *Quinby v. Slipper*, 7 Wash. 475 (35 Pac. 116), it was especially stated by this court that nothing could be done by any person

in reference to property held by the court, looking to the enforcement of any lien against it, without the leave of the court first obtained. *Hamilton-Brown Shoe Co. v. Adams*, 5 Wash. 333 (32 Pac. 92), was where there was an attempt to seize property in the possession of an assignee by writ of attachment. The lien in that case was sought to be established by the attachment itself, a very different proposition from the one at bar. Probably the case which comes nearest to sustaining appellant's theory is *Meeker v. Sprague*, 5 Wash. 242 (31 Pac. 628). That was a case where the mortgagee made application to the court for permission to sue the receiver, which permission was refused, and from which order of refusal an appeal was taken to this court. There it was held that where a court has, in a suit in equity, regularly acquired full jurisdiction and has appointed a receiver for the corporation, the refusal of the court to allow a mortgagee of the corporation to institute foreclosure proceedings in a separate suit against the receiver is not an abuse of the discretion vested in the court. It is true that it was stated in the opinion in that case that the court did only what it should have done when it refused to allow another suit in equity to be instituted; but that case was based on the theory that such application was a matter addressed to the sound discretion of the court and would not be disturbed unless it was found that such discretion was abused.

"Under these circumstances" said the court, "it is clear to us that the application thus made by appellant was addressed to the sound discretion of the court in which it was presented. This is so clear from the authorities cited that we do not think it necessary to argue the question, especially as we do not understand the appellant to seriously dispute the proposition."

We do not desire to extend the restrictions on the rights of mortgagees to foreclose mortgages in the ordinary manner provided by law beyond the rule announced in that case, and if, as we held there, the application was a matter submitted to the discretion of the court in that case, the judgment of the court could not be collaterally attacked in the manner attempted here. This case also falls squarely under the rule announced by this court in *Gilbert Hunt Mfg. Co. v. Wheeler*, ante, p. 594. It is true in that case the question of the right of possession provided for in the mortgage, which was a chattel mortgage, is somewhat discussed in the opinion, but outside of that the rule announced is in harmony with respondent's contention.

The judgment will be affirmed.

SCOTT, ANDERS and GORDON, JJ., concur.

HOYT, C. J., dissents.

[No 2327. Decided November 24, 1896.]

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JAMES LUCE, *Respondent*, v. LELLA B. LUCE, *Appellant*.

APPEAL — MOTION TO DISMISS — DIVORCE — RESIDENCE OF PLAINTIFF —
ABUSIVE TREATMENT.

A motion to dismiss an appeal, which is not set out in respondent's brief, will not be considered, when it raises no jurisdictional question.

In an action for divorce plaintiff must affirmatively plead, and satisfactorily prove, prior residence in the state for the period of a year or more.

The fact that plaintiff left his home in the East and came to the state of Washington in search of a location, afterwards going to the state of California in pursuit of the same object, and then returning

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to the state of Washington, where he settled and went into business, is not sufficient to establish his residence here before his return from California, in the absence of proof of any intention to make a definite location in this state prior to his actual settlement.

Plaintiff is not entitled to a divorce upon the ground of abuse, when the only evidence to support the action is proof, in the most general terms, of abusive language on the part of defendant, and plaintiff's own testimony shows that he was alike culpable.

Appeal from Superior Court, Snohomish County.—
Hon. JOHN C. DENNEY, Judge. Reversed.

Coleman & Fogarty, for appellant.

George E. Banks, for respondent.

The opinion of the court was delivered by

HOYT, C. J.—Respondent has filed a motion to dismiss the appeal, but it raises no jurisdictional question and was not set out in his brief; it must, therefore, be denied.

The action was brought to obtain a divorce. It was tried upon an amended complaint in which the only allegation as to the residence of the plaintiff in the state was "that for one year last past and more, immediately preceding the filing of his amended complaint herein, he has been a resident of the state of Washington, and now is an actual resident of the county of Snohomish, and has been for more than eight months last past."

Defendant's first contention is that, since it does not appear from this allegation that plaintiff had been a resident of the state for one year or more before the commencement of the suit, the complaint did not state a cause of action in that it failed to show jurisdiction over the subject matter. That the complaint in an action for divorce should show affirmatively that the plaintiff has been a resident of the state for

more than a year before the action was commenced is undoubtedly true, and if nothing further had appeared in the pleadings, taken as a whole, than the allegation above referred to, the contention of the appellant would have to be sustained. But the original complaint filed in the action contained a sufficient allegation as to the residence of the plaintiff; and in view of that fact we should not be disposed to reverse the decree by reason of the insufficiency of the allegation upon that subject in the amended complaint, if from the proof it satisfactorily appeared that in fact the plaintiff had been and was a resident as alleged in the original complaint. We have, therefore, examined the proof upon that subject. This examination not only fails to satisfy us as to the truth of the allegation contained in the original complaint, but, on the contrary, has compelled us to come to the conclusion that the allegation in the amended complaint was as favorable to the plaintiff as the facts would warrant, and that that in the original complaint was not true.

The action was commenced in January, 1895, and plaintiff's own testimony failed to show that he became a resident of the state before June, 1894. More than that, the evidence given by him affirmatively showed that he was not a resident of the state of Washington until about June, 1894. He testified that he left the east for the purpose of finding a new location in which to do business; that he came to the state of Washington in January or February, 1894, and stopped at the cities of Seattle and Tacoma; that thereafter he went to the state of California in further pursuit of the object which induced him to leave the east; that he returned to the state of Washington and went into business in the city of Everett about the month of June,

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1894. This testimony satisfies us that he was not a resident of the state of Washington until his return thereto from the state of California, when he located in business at the city of Everett. It might be inferred from this testimony that plaintiff lost his residence in the east when he left there, but even this does not clearly appear. And there is nothing therein which tends to show that he had any intention as to any definite location until he reached Everett upon his return from California. This being so, the plaintiff failed to prove a fact necessary to entitle him to any relief.

We have, however, looked further into the testimony and are satisfied that it was not sufficient to warrant the court in granting a divorce, even if the jurisdictional fact as to residence had sufficiently appeared. No abuse by the defendant was shown except in the use of abusive language, and this was only testified to by the plaintiff and his sons in the most general terms; and the testimony of the plaintiff himself showed that he had not had more regard for the feelings of the defendant than she had for his.

The decree will be reversed and the cause remanded with instructions to dismiss the action.

SCOTT and ANDERS, JJ., concur.

DUNBAR, J., concurs in the result.

GORDON, J. (*concurring*).—I concur in the result, but not upon the grounds stated in the opinion of the majority. The appellant (defendant below) *demurred* to the *amended* complaint upon the ground that the court had no jurisdiction of the subject matter of the action, and upon the further ground that it did not state facts sufficient to constitute a cause of action. This *demurrer* was overruled and exception reserved. I con-

cur in the view of the majority that "the complaint in an action for divorce should show affirmatively that the plaintiff has been a resident of the state for more than one year before the action is commenced," and am, therefore, of the opinion that the demurrer should have been sustained.

The decision of the lower court upon the demurrer could not have been predicated upon proofs which had not then been taken. The only question involved was the sufficiency of the amended complaint, and it seems to me novel doctrine to hold that in determining a question of that character resort may be had to an original pleading, or to the evidence subsequently admitted upon the trial. Sec. 222, Code Proc. (2 Hill's Code), provides that when any pleading is amended before trial it shall be done by filing a new pleading, and "such amended pleading shall be complete in itself, without reference to the original or any preceding amended one;" and this I understand to be the general rule in code states. Upon its face the complaint was demurrable, and, a demurrer having been seasonably interposed, it should have been sustained. Not sustaining it was reversible error, which was not waived by any subsequent proceedings upon the part of the appellant.

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Argument of Counsel.

[No. 2259. Decided November 25, 1896.]

*In the Matter of the Estate of Hugo A. Kohler, Deceased:*WILLIAM H. BRINKER, *Executor, Appellant*, v. LENAR. PEASLEY *et al.*, *Respondents*.

EXECUTORS—LIABILITY FOR MONEY DEPOSITED IN BANK.

An executor, who in good faith deposits funds of the estate in a bank at the time solvent and of good repute, is not liable for depreciation of the trust funds resulting from the subsequent failure of the bank, if the deposit is made to the credit of the estate, and not in the executor's individual name.

Appeal from Superior Court, King County.—Hon. THOMAS J. HUMES, Judge. Reversed.

Relfe & McCutcheon, for appellant:

The executor is not chargeable with, nor compelled to pay to the beneficiaries under the will or to creditors, the amount of money lost, by the failure or suspension of the bank, and he is entitled to credit upon his account for such amounts, when ascertained. *Clough v. Bond*, 3 Mylne & C. 490; 2 Story, Equity Jurisprudence, 1270, 1271; *Barney v. Saunders*, 16 How. 535; *Harvard College v. Amory*, 9 Pick. 446; *State v. Meagher*, 44 Mo. 357 (100 Am. Dec. 298); *Lamar v. Micou*, 112 U. S. 452. An administrator is not an insurer of the property of a decedent. He is liable for the loss thereof only when he fails to exercise that care and diligence which a prudent man would exercise in the care and management of his own property. *Fudge v. Durn*, 51 Mo. 264; *McCabe v. Fowler*, 84 N. Y. 314; *Johnson v. Newton*, 11 Hare, 160; *Whitney v. Peddicord*, 63 Ill. 252; *Livermore v. Wortman*, 25 Hun 341; *Patterson v. Wadsworth*, 89 N. C. 407; *Sea-*

well v. Greenway, 75 Am. Dec. p. 803, note; *Shipley v. Wood*, 4 Md. 493; *Nelson v. Hall*, 5 Jones Eq. 32.

Elder & Harger, and *Sidney Moore Heath*, for respondents:

There is no authority by law in the state of Washington for an executor to invest the funds of an estate in his hands pending settlement of the estate. The executor holds the property of the testator for the payment of the debts and legacies, and for the application of the surplus according to the will of the testator. The money received is held in a fiduciary capacity for the use of the creditors and others interested as beneficiaries under the will, and it is his duty to retain in his hands the money thus received, until it can be applied and distributed in the order and mode provided by law. *Magraw v. McGlynn*, 26 Cal. 424. There was no necessity for a loan. An executor is not liable for interest if the funds are not productive, as the function is to administer, not to invest. *Wyman v. Hubbard*, 13 Mass. 232; *Fox v. Wilcocks*, 1 Bin. 194 (2 Am. Dec. 433); *Brandon v. Hoggatt*, 32 Miss. 335; *Verner's Estate*, 6 Watts, 250; *Ogilvey v. Ogilvey*, 1 Brad. Sur. 356; *Jacob v. Emmett*, 1 Payne, 145.

The executor in this case is not a trustee, and the cases cited by the executor have no application for the reason that they refer to trustees under an express trust. *Flint, Trusts*, § 157; *State v. Nicols*, 10 Gill & J. 27. An executor derives his authority from his appointment by the court, and not from his appointment in the will. *Deering v. Adams*, 37 Me. 265; *Mahony v. Hunter*, 30 Ind. 246.

The loaning of moneys belonging to an estate by an executor on personal security, is directly contrary to law. 2 Pomeroy, Eq. Jur. § 1074. The modern

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English authorities are to the effect that investing trust money in personal security is a breach of trust. 2 Kent, Commentaries, 414-419; *Rider v. Bickerton*, 3 Swanst. 80; *Holmes v. Dring*, 2 Cox, 1; *Adye v. Feuilleteau*, 3 Swanst. 84; *Walker v. Symonds*, 3 Swanst. 63. In New York an executor is responsible, if he invests trust moneys otherwise than upon real estate or in government stocks. *Ackerman v. Emott*, 4 Barb. 626. In *Gray v. Fox*, 1 N. J. Eq. 259, the question of what is due security in respect to trustees loaning money was learnedly discussed, and it was declared to be a well settled rule in the English chancery, and was adopted in New Jersey, "that the loaning of trust moneys on private or personal security was not due security, and such loans were at the risk of the trustee." A trustee must take adequate real estate security or an investment in public stocks or funds. *Smith v. Smith*, 4 Johns. Ch. 281; *Bogart v. Van Velsor*, 4 Edw. Ch. 718; *Moore v. Hamilton*, 4 Fla. 112; *Hogan v. De Peyster*, 20 Barb. 100; *Smyth v. Burns*, 25 Miss. 422; *Stickney v. Sewell*, 1 Mylne & C. 8.

The opinion of the court was delivered by

GORDON, J.—Appellant is the executor of the estate of Hugo A. Kohler, deceased. As such executor he received on March 28, 1893, a sum of money amounting to upwards of \$3,000, the proceeds of certain insurance upon the life of the testator, and on the same day he deposited in the Washington Savings Bank of Seattle the sum of \$2,500, taking certificates of deposit therefor payable to himself *as such executor* with interest at six per cent. per annum. Subsequently the bank suspended and passed into the hands of a receiver, whose certificates for said sum of \$2,500 the appellant, as executor, holds in lieu of

cash, and for which sum he sought in the lower court to be allowed credit on his account. The lower court having disallowed his claim in this respect, the cause comes here upon appeal.

Respondents contend that the executor is not authorized by law to invest the funds of an estate in his hands pending settlement of the estate; that it is his duty to retain *in his hands* the money thus received until it can be applied and distributed in the order and mode prescribed by law.

It is conceded that in making the deposit in question the executor acted in good faith, and that the bank was then solvent and of good repute. In *Fairchild v. Hedges*, 14 Wash. 117 (44 Pac. 125), this court held that a county treasurer was liable for the funds of the county deposited by him in a bank which afterwards became insolvent. Counsel for the treasurer in that case cited numerous cases in which it had been held that executors, administrators and guardians were not liable under such circumstances, and in referring to the line of authorities thus relied upon, this court said:

"The distinction is very clear between the liability and duty of one receiving moneys as a guardian, for the benefit of a private individual, and the liability imposed by statute and by express undertaking upon a public officer as in the case at bar. As to the former, 'he is merely the trustee or agent of the private parties interested in the money, and no greater or higher responsibility should be imposed upon him than would be imposed upon any agent or trustee.' *People v. Faulkner*, 107 N. Y. 488 (14 N. E. 415)."

It is true that this court was not called upon in that case to decide the question involved in the present case, but it is nevertheless true that we recognize that a distinction existed between the liability o

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a public officer dealing with public moneys and that of an executor or guardian who deals with the funds of individuals, and this recognition was not simply mere dictum.

The uniform holding of courts has been that executors, administrators and guardians are bound by no greater or higher responsibility than that which is imposed upon any agent or trustee, and where such a one in good faith deposits money in a bank of good repute *to the trust account*, he ought not to be held liable for its loss in consequence of the failure of the bank. *Jacobus v. Jacobus*, 37 N. J. Eq. 17; *Twitty v. Houser*, 7 S. C. 153; *Cox v. Roome*, 38 N. J. Eq. 259; *Norwood v. Harness*, 98 Ind. 134 (49 Am. Rep. 739); *In re Law's Estate*, 144 Pa. St. 499 (22 Atl. 831); *People v. Faulkner*, 107 N. Y. 488 (14 N. E. 415); *Moore v. Eure*, 101 N. C. 11 (9 Am. St. Rep. 17, 7 S. E. 471); *People v. Walsen*, 17 Colo. 170 (28 Pac. 1119); *Ex Parte Jones*, 4 Cranch C. C. 185; 2 Pomeroy, Equity Jurisprudence, §1067; Schouler, Executors and Administrators, §313; 2 Woerner, American Law of Administration, p. 711; 3 Redfield, Wills, 394; 1 Perry, Trusts, §443.

While many of the courts, from whose decisions we have cited, hold public officers, such as state, county and township treasurers, to be *absolutely* liable for all public money received by them, none of them (so far as we have been able to discover) have held that executors or trustees are bound by a similar obligation. We do not think the general rule is displaced by the statute in this state. Section 1052, Code Proc., (Vol. II of the Code), provides that an administrator (or executor) shall not make profit by the increase, nor suffer loss by the decrease or destruction without his fault of any part of the estate, and in the event of

the sale of any portion of the estate for less than the appraisement, he shall not be responsible for any loss "if the sale has been justly made." The succeeding section, 1053, provides that he shall not be "accountable for any debts due the estate if it shall appear that they remain uncollected without his fault."

It further appears from the record that on March 28, 1893, (the day upon which he received the money) the appellant made an application to the superior court for an order directing him to invest the sum of \$2,500, and thereupon the court ordered him to deposit that amount in some secure bank in the city of Seattle, and the deposit in question was actually made on that day. Without deciding whether this order constituted in itself a sufficient justification, we think that appellant has not been guilty of any misfeasance or neglect, and that he should be credited on his account with the amount of the deposit.

The judgment will be reversed and the cause remanded for further proceedings in accordance with this opinion.

HOYT, C. J., and SCOTT, ANDERS and DUNBAR, JJ., concur.

[No. 2386. Decided November 25, 1896.]

LYSANDER LYONS *et al.*, Respondents, v. GEORGE FOWLER *et al.*, Appellants.

ESTOPPEL IN PAIS — RELEVANCY OF REPRESENTATIONS RELIED ON.

One who holds the legal and record title to real estate is not estopped from setting up his ownership as against one to whom he had stated that he had transferred it to a third party, and who subsequently purchases it at execution sale as the property of such

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third party, when the statement as to ownership was made several months before the levy of execution and in connection with a proposition at the time for a trade of the premises.

Appeal from Superior Court, King County.—Hon. J. W. LANGLEY, Judge. Affirmed.

James M. Epler, for appellants.

Elwood Harshman, for respondents.

The opinion of the court was delivered by

Hoyt, C. J.—Prior to November 2, 1893, John W. McMahan and Merritta McMahan, husband and wife, were the owners of the land the title to which was in question in this action. On that day, for a valuable consideration, they conveyed it to the respondents. On the 13th day of July, 1894, a judgment was duly rendered in the superior court of Snohomish county, in favor of Jacob Brandt & Co. against the said John W. McMahan and Merritta McMahan, upon which an execution was issued on the 4th day of August, 1894, and levied upon the property in controversy, which was thereafter sold to satisfy the execution and bid in by the appellants, to whom a certificate of sale was duly issued.

There is no contention that the paper title, both of record and in fact, was not in the respondents at the time of the levy and sale; but the appellants claim that the respondents should not be allowed to assert their title against that acquired by appellants under the execution sale, for the reason that they are estopped from so doing by certain declarations and representations made by them to appellants. These representations were made in February and March, 1894, and grew out of a proposition made by the appellants to the respondents to trade certain real

estate in the city of Seattle for the property in question. In answer to this proposition the respondent Lysander Lyons wrote the appellant George Fowler to the effect that he had deeded the property to Mrs. McMahan, and that a trade, if made, would have to be with her. It was also claimed that like statements were made by said respondent to the appellant in a conversation between them, and that the respondent Rhoda S. Lyons had made statements to the same effect; and the claim was that, by reason of these statements, respondents were estopped from denying that the title to the property was in the McMahans.

As to whether or not some of these statements were made, there was a conflict in the evidence; but even if they were all made just as claimed by the appellants, we are of the opinion that they were not sufficient to estop the respondents from asserting their title as against that acquired by the appellants under the execution sale. If the statements had been made at or near the time of the execution sale and in view of a purchase thereunder by the appellants, they might have been sufficient to estop respondents. But the statements relied upon were made several months before the levy of the execution upon the property; and while it is true that there had been no change of the legal title between the time that such statements were made and the date of such levy, there might have been such changes in the surrounding circumstances as to greatly affect the relations of the McMahans to the legal title which was all the time in the respondents.

Beside, the representations were only material in connection with the transaction in which they were made, which was the proposed trade of certain property of the appellants for that in question. They had

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no reference whatever to the action of the appellants in purchasing the property at forced sale. The respondents may well have been willing to have had the appellants treat the title as vested in the McMahan's for the purpose of a trade for other property, yet unwilling that the title should be so treated for the purpose of having made therefrom the money due upon the judgment against the McMahan's. In the one case it would have been within the power of the McMahan's to use the property received in the trade for the benefit of the respondents. In the other the McMahan's would have nothing with which they could reimburse the respondents for the property taken in execution.

Judgment, affirmed.

DUNBAR, SCOTT, ANDERS and GORDON, JJ., concur.

[No. 2276. Decided November 27, 1896.]

THE STATE OF WASHINGTON, *Respondent*, v. WILLIAM
WROTH, *Appellant*.

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MISCONDUCT OF JUDGE—HOW SHOWN—RECORD ON APPEAL.

The minutes of the clerk of the superior court and affidavits will not be received or considered by the supreme court for the purpose of showing the alleged misconduct of the trial judge, but the facts must be accepted as certified by the judge in the statement of facts settled by him.

The action of the trial court in leaving the bench and entering the jury room, at the request of that body while in consultation, is such misconduct as to warrant a reversal.

Appeal from Superior Court, Snohomish County.—
Hon. J. C. DENNEY, Judge. Reversed.

Melvin G. Winstock, Allen & Headlee, and Frank B. Ingersoll, for appellant.

J. W. Heffner, Prosecuting Attorney, and *Arthur W. Hawks*, for The State.

The opinion of the court was delivered by

GORDON, J.—Appellant was charged, in an information filed by the prosecuting attorney of Snohomish county, with the crime of murder in the first degree. He was found guilty of manslaughter and sentenced to imprisonment in the penitentiary for the period of ten years. Having moved for a new trial his motion was denied and he has appealed.

Upon the oral presentation of this cause, counsel for the appellant waived all assignments of error save one, which relates to the alleged misconduct of the presiding judge. Counsel for the appellant have sought to show, by affidavit and by purported minutes of the clerk of the superior court, that, after the trial had closed and the jury had retired for deliberation, they requested to see the judge, and thereupon the judge left the bench and went into the jury room and closed the door, and thereafter returning to the court room stated to counsel for the prosecution and defense that the jury desired to be further instructed upon the subject of reasonable doubt.

The affidavits and minutes cannot be received or considered by this court for the purpose of showing what occurred below. The lower court declined to certify to the facts as claimed by the appellant, but certified an amended bill prepared by counsel for the state, and the bill so certified must be accepted by this court. It is therein stated that at the close of the argument,—

“The jury were duly and regularly instructed by

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Opinion of the Court — GORDON, J.

the court and retired to deliberate on their verdict in charge of the officer of the court, and soon thereafter the jury, through their bailiff, requested to see the judge, and the said judge, being the same judge who tried the cause, went to the jury room and stood in the doorway with the door to said jury room partly opened; that thereafter the said judge returned and informed the counsel for the defendant and state that the jury, through its foreman, had requested that the said judge repeat to them the instruction given on reasonable doubt."

It is contended by the appellant's counsel that this constituted such misconduct on the part of the trial judge as requires a reversal, and we think the contention must be sustained. In the discharge of his official duty the place for the judge is on the bench. As to him the law has closed the portals of the jury room and he may not enter. The appellant was not obliged to follow the judge to the jury room in order to protect his legal rights, or to see that the jury was not influenced by the presence of the judge; and the state cannot be permitted to show what occurred between the judge and the jury at a place where the judge had no right to be, and in regard to which no official record could be made.

But learned counsel for the state insist that the judge said nothing to the jury, and hence his conduct could not have been prejudicial to the defendant. But the law does not subject parties litigant to the disadvantage of being required to accept the statement of even the judge as to what occurs between himself and the jury at a place where the judge has no right to be and where litigants cannot be required to attend. It is the lawful right of a party to have his cause tried in open court, with opportunity to be present and heard in respect to everything transacted. It is his right to

be present and attended by counsel whenever it is found necessary or desirable for the court to communicate with the jury, and he is not required to depend upon the memory or sense of fairness of the judge as to what occurs between the judge and jury at any time or place, when he has no lawful right to be present. His right in this respect goes to the very substance of trial by jury.

Aside from the rights of the parties, public policy will not sanction any departure from the rule which requires that all such communications shall be public and in the presence of the parties or their counsel.

In *Sargent v. Roberts*, 1 Pick. 337 (11 Am. Dec. 185), a communication from the judge to the jury which was in writing and filed so that there could be no question of its terms, and which was unobjectionable in substance, was yet, because of its being made out of court and in the absence of the parties, held improper and illegal, and the reasons were thus stated by Chief Justice PARKER:

"No communication whatever ought to take place between the judge and the jury, after the cause has been committed to them by the charge of the judge, unless in open court. . . . The only sure way to prevent all jealousies and suspicions is to consider the judge as having no control whatever over the case, except in open court in presence of the parties and their counsel. The public interest requires that litigating parties should have nothing to complain of or suspect in the administration of justice, and the convenience of jurors is of small consideration compared with this great object. . . . It is better that everybody should suffer inconvenience, than that a practice should be continued which is capable of abuse, or at least of being the ground of uneasiness and jealousy."

In *Taylor v. Betaford*, 13 Johns. 487, the judge went into the jury room with the jury at their request to ans-

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wer certain questions proposed by the jury. Of this conduct the court say:

"Whether the information given by the justice were material, or had any influence upon the verdict of the jury, is a matter which we will not inquire into."

A like conclusion was reached by the court of appeals in *Watertown Bank v. Mix*, 51 N. Y. 558.

In *Read v. Cambridge*, 124 Mass. 567 (26 Am. Rep. 690), a like conclusion was reached, the court saying that "*the court will not inquire whether the communication was in fact erroneous or prejudicial.*"

The judgment will be reversed and a new trial awarded.

SCOTT, ANDERS, and DUNBAR, JJ., concur.

HOYT, C. J., dissents.

[No. 2303. Decided November 27, 1896.]

THE STATE OF WASHINGTON, *Respondent*, v. ROSE ZETTLER, *Appellant*.

CRIMINAL LAW—RECORD ON APPEAL—INSUFFICIENCY OF EVIDENCE—
ASSIGNMENT OF ERRORS—MISCONDUCT OF BAILIFF.

The alleged insufficiency of the evidence to sustain a verdict of guilty will not be considered on appeal, when the record does not purport to contain all the material facts, matters and proceedings produced and had at the trial.

The fact that the bailiff informed the jury that, if they did not return a verdict by a certain hour, he would keep them locked up all night, does not amount to misconduct when the statement was made, not for the purpose of influencing the jury in their action, but to inform them that it was the intention of the court to go home at that hour, and that, if the verdict was not returned before that time, it could not be till morning.

An assignment that the court erred in giving instructions will

not be considered on appeal, when there is no specification in the brief as to what the error was.

Appeal from Superior Court, Pierce County.—Hon. EMMETT N. PARKER, Judge. Affirmed.

Von Tobel & Humphrey, and Claypool, Cushman & Cushman, for appellant.

G. W. H. Davis, for The State.

- The opinion of the court was delivered by

Hoyt, C. J.—The defendant was convicted of the crime of grand larceny, and from the judgment and sentence imposed has prosecuted this appeal.

Three errors are relied upon. (1) That the court erred in refusing to discharge the defendant at the close of the State's evidence. (2) That the court erred in refusing a new trial because of the insufficiency of the evidence. (3) That the court erred in refusing a new trial on the ground of the misconduct of the jury and the bailiff having the same in charge.

The first two raise substantially the same question and are founded entirely upon the alleged insufficiency of the evidence. But the record is not such that appellant can make available such alleged insufficiency. It does not purport to contain all of the evidence produced upon the trial. Nor does it appear from the certificate of the judge, or otherwise, that what is brought here contains all the material facts, matters or proceedings.

The third allegation is founded upon the alleged fact that the bailiff informed the jury that, if they did not agree by nine o'clock, he would keep them locked up all night. If it appeared that this statement was made for the purpose of inducing the jury to arrive at a speedy verdict, and that there was no other reason

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for making it, there might be ground for contending that it showed such improper action as to require the granting of a new trial. But it appeared that this statement was not made for the purpose of influencing the jury in their action, but to inform them that it was the intention of the court to go home at nine o'clock, so that if a verdict was not returned by that time, it could not be returned until morning, and for that reason the jury would necessarily be kept together during the night unless the verdict was returned before nine o'clock.

There is another general allegation of error to the effect that the court erred in giving its instructions to the jury, but there is no specification in the brief as to what the error complained of was, and without such specification the assignment is too indefinite to require notice.

The judgment and sentence will be affirmed.

DUNBAR, ANDERS, SCOTT and GORDON, JJ., concur.

[No. 2396. Decided November 27, 1896.]

JOHN B. AULT, *Respondent*, v. INTERSTATE SAVING
AND LOAN ASSOCIATION, *Appellant*.

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ACCOUNT STATED — WHAT AMOUNTS TO — EVIDENCE — PRESUMPTIONS.

An account made out by one and presented to the person against whom the charges are made, and not objected to by him within a reasonable time, will be taken to have been consented to so as to become stated, the determination of what is a reasonable time depending upon all the circumstances surrounding the business transactions of the parties.

When the facts in regard to the statement of an account are agreed upon, the question of what is a reasonable time within which the account will be presumed to become stated, is one of

law; and, when the facts are not agreed upon, it is a mixed question of law and fact.

The presumption that an account had been consented to so as to become a stated account is not warranted by proof showing that an attorney had presented his bill for services to a client in another city, and that, some twenty days after the receipt of the letter, the latter had written asking for information in order to determine as to the justness of the account, which the attorney failed to give; and the fact that the client had not denied the bill rendered would not show an agreement thereto, so long as the demand for information had not been complied with.

The presumption that a letter duly mailed has reached its destination will have but little weight against positive testimony to the effect that it was never received.

Appeal from Superior Court, Snohomish County.—
Hon. J. C. DENNEY, Judge. Reversed.

Shank & Smith, for appellant.

Coleman & Hart, for respondent.

The opinion of the court was delivered by

HOYT, C. J.—It was alleged in the complaint filed in this action that on the 26th day of August, 1895, an account was stated between the plaintiff and defendant, upon which statement a balance was found to be due from the defendant to the plaintiff of \$1,873.25; that said defendant then and there agreed to pay the said sum, but that it had not paid the same nor any part thereof. Defendant's answer denied that any account had been stated, or that it had agreed to pay the respondent as alleged in his complaint; and further denied that defendant had agreed to pay the plaintiff any sum whatever which had not been paid. Such answer also set up certain counterclaims and asked for judgment thereon. The items of these counterclaims were admitted in the reply of the plaintiff, but it was alleged that the amount

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thereof had been credited to the defendant in the stated account sued upon. Upon the issues made by these pleadings a trial was had, and a verdict returned by the jury in favor of the plaintiff, upon which, after a motion for a new trial had been made and denied, judgment was rendered for \$1,959.90, in favor of the plaintiff and against the defendant.

One of the errors alleged is that the evidence was not sufficient to sustain the verdict. Plaintiff testified that on August 26, 1895, he made up an account against the defendant in substantially the following form:

"Inter-State Savings & Loan Ass'n,

Minneapolis, Minn.

To John B. Ault, Dr.

To services rendered between the years

1889 and 1895, \$1,720.00

To Hudson & Sipprell and Stingley and

Downs foreclosure suits, 195.00

To Gustav Sorenson foreclosure suit, 60.00

To Nelson Eddy " " 60.00

To draft C. B. Aldrich, 100.00

To interest on above draft, 50.00

To withdrawal value of Zwiefelhofer and

Zelhi certificate of stock assigned

over for a valuable consideration, 185.83

\$2,370.83

Credits.

By cash, \$85.00

" $\frac{1}{2}$ M. D. Montgomery's due, "

That in connection therewith he wrote a letter of transmittal of which the following is a copy :

"Dictated by J. B. A.

"SNOHOMISH, WASH., Aug. 26th, 1895.

"*Inter-State Savings & Loan Association,*

"*Minneapolis, Minn.*

"*Gentlemen* :—Enclosed please find my bill for ser-

vices rendered for you per your request; also Hudson & Sipprell and Stingley & Downs foreclosure cases; also Gustav Sorenson foreclosure suit; also Nelson Eddy foreclosure suit; also draft of C. B. Aldrich and interest; also withdrawal value of Zwiefelhofer & Zelhi stock No. 2,651. I have credited your account with the eighty-five (\$85.00) dollars you sent me; also will credit your account with the amount due you from M. D. Montgomery's one-half on the Phoebe Steacy loan when you send it to me.

"I want to say that you will be indebted to me in damages for all business you give to any other attorney for this county under my contract with you.

"Asking you for an immediate settlement, I remain,
"Yours truly, JOHN B. AULT."

He further testified that at the same time he wrote an additional letter of which the following is a copy :

"Aug. 26th, 1895.

"*Inter-State Savings & Loan Association,*

"*Minneapolis, Minn.*

"*Gentlemen:*—Since writing the enclosed letter and making up the enclosed statement of my bill against you, I left the Montgomery item blank which I have by looking the matter up found it to be \$412.58; so add it to the \$85.00 cash received credited on enclosed bill, and it will make a total credit due you of \$497.58. Deduct same from the total of my bill of \$2,370.83 and it leaves a balance due me of \$1,873.25.

"Yours truly, JOHN B. AULT."

That he inclosed it with the account and the other letter and mailed the package containing these inclosures to the defendant on said 26th day of August, 1895. This letter in due course should have reached the defendant about four days after it was mailed, and the testimony upon the part of the defendant showed that an envelope containing the account and letter first above set out was received at its office in Minneapolis. But it also showed that the second letter was

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never received by defendant. The testimony in behalf of the defendant further showed that at the time this account and letter of transmittal were received, its president and general manager was out of the city for a few days, and that his presence was necessary before it could receive attention; that for this reason no action was taken upon the account rendered by the plaintiff until September 19, at which time a letter was written by the general manager of the defendant to the plaintiff, of which the following is a copy:

“Sept. 19th, 1895.

“*Mr. John B. Ault,*

“*Snohomish, Wash.*

“*Dear Sir:*—Your of the 26th ult. with account inclosed comes to my desk for consideration.

“As we are without data as to the alleged contract mentioned in the last paragraph of your favor, and as the terms of such contract will probably enter into the consideration of the account, we will be obliged to you for a copy thereof and promise you that an early day after the receipt of the same your bill shall be taken up and considered upon its merits.

“Yours truly,

“HORACE AUSTIN, Gen'l Manager.”

This letter was sent to the plaintiff by registered mail and the return receipt showed that it was delivered about the 24th day of September. No action was taken in reference thereto by the plaintiff until September 30, 1895, at which time his testimony tended to show that he wrote and mailed to the defendant a letter in the following language:

“Sept. 30th, 1895.

“*Horace Austin, Esq., Gen'l Manager,*

“*Inter-State Savings & Loan Association,*

“*Minneapolis, Minn.*

“*Dear Sir:*—Yours of the 19th inst. to hand. The first item of my bill rendered you is for work done for

the Association at its special instance and request and therefore is executed and you are well aware of that work done and that the price is reasonable.

"I told the Association when in your city the last time that I had paid for the attorneyship for this county and related the facts with your Secretary Mendel and he said it was all right and would acknowledge that I had a good contract.

"As I stated in my letter of the 26th of August last that I would hold the Association liable in damages for all business it would give to any other attorneys outside of myself for this county under my contract with the Association. I still adhere to that.

"I shall take it the Association has agreed to my bill rendered if it does not deny the same.

"Yours truly, JOHN B. AULT."

The testimony on the part of the defendant was to the effect that this letter was never received by it. On the 19th of October following the complaint in this action was verified and on the 26th of the same month the action was commenced.

This statement contains all the proofs relied upon by the plaintiff to show that the account had become stated between himself and the defendant, and substantially all that was proven by the defendant to negative this claim of the plaintiff. Some other facts were relied upon by the defendant, but in our opinion it is not necessary to notice them in deciding the question as to the sufficiency of the proof to sustain a verdict, which could only have been rendered by reason of proof of an account having been stated between the plaintiff and the defendant, as alleged in the complaint.

That an account made out by one and presented to the person against whom the charges are made, and not objected to by him within a reasonable time, will be taken to have been consented to so as to become

stated, is shown by nearly or quite all modern authorities. The old decisions to the effect that this rule applied only to transactions between merchants has become obsolete, and it is now held to apply to all classes, uninfluenced by their relation to each other, except that such relation will be taken into consideration in determining as to what is a reasonable time within which a failure to object will be held to have amounted to a consent that the amount is correctly stated. As to what is such reasonable time, when the facts are agreed upon, is under all the authorities a question of law, and, when the facts are not agreed upon, it is a mixed question of law and fact. In either case, what is a reasonable time will depend upon all the circumstances surrounding the business transactions of the parties, and until there has been such a delay in making the objection that in the light of all such circumstances it could not have been reasonably expected, a consent to the correctness of the account will not be presumed.

Under these rules, was there such delay on the part of the defendant as to make the account in question a stated one, even if the proofs offered on the part of the plaintiff were taken to be true and not to have been affected by any testimony offered on the part of the defendant? All that was shown by these proofs was that on August 26th the account was mailed to the defendant in Minneapolis; that nothing was done in reference thereto until September 19th, at which time certain information was asked of the plaintiff to enable the defendant to determine as to the justness of the account, and that in his reply to the letter asking this information the plaintiff neglected to give to the defendant the information requested; that thereafter nothing was done until the commencement of the

action on October 26th. And in our opinion it did not appear therefrom that there had been such a failure to object on the part of the defendant as to warrant the assumption that the account had been consented to. It is true that there was a delay of some fifteen or twenty days from the time it received the letter containing the account before it called for information in reference thereto. But in view of the course of business between the parties, such delay was not in itself so unreasonable as to warrant the assumption that the account had been approved. Nor was the lapse of twenty or twenty-five days after the receipt by the defendant of plaintiff's letter of September 30th sufficient for that purpose, especially in view of the delay of the plaintiff in answering defendant's letter of the 19th. Beside, it may well be questioned whether the failure to further object to the account for any length of time would have amounted to a consent thereto after the letter of September 19th calling upon the plaintiff for information had been written, until the information therein called for had been furnished, or the failure to furnish it explained.

In our opinion the plaintiff failed to make out a *prima facie* case but even if such a case was made out it was entirely overcome by the undisputed proofs on the part of the defendant. If the second of the letters above set out never reached the defendant, then there never was such an account rendered as could by any lapse of time become an account stated. One of the items of such account was not filled out; hence it was not a complete statement of the account between the parties. If this letter was received with the account it was probably sufficient to complete it. But while the testimony on the part of the plaintiff may have been sufficient to raise a presumption that it was re-

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ceived, that presumption was entirely overcome by the testimony on the part of the defendant, which was to the effect that such letter had never been received. The letter might have been inclosed as stated by plaintiff, and yet never have come to the attention of the defendant. If it was in the envelope, the fact that the account was there with one letter of transmittal may have led the defendant to overlook the second letter. The *prima facie* showing made by the plaintiff as to the letter of September 30th was even more completely overcome by the testimony on the part of the defendant. From the mailing of the letter to the defendant but a *prima facie* presumption that it was received in due course of mail arose, and when the defendant testified in express terms that it was not received, this presumption was entirely negatived; not because such testimony was in conflict with that of the plaintiff, but because it overcame a presumption flowing from the acts proved. A letter mailed to a person does not necessarily reach him, and while for convenience sake and from the necessity of business its reception will be presumed, this presumption flowing from the fact that letters usually reach their destination, can have little weight as against positive testimony to the effect that the letter was never received.

It does not appear from all the proofs that the account was consented to by the defendant. It follows that the judgment must be reversed; but, in view of the circumstances and of the lapse of time since the action was brought, justice will be best subserved by remanding the cause for a new trial with leave to file amended pleadings.

DUNBAR, ANDERS and GORDON, JJ., concur.

[No. 2270. Decided November 28, 1896.]

AUGUSTA FROELICH, *Respondent*, v. D. W. MORSE *et al.*,
Appellants.

APPEAL — BRIEFS — ASSIGNMENT OF ERRORS — TRESPASS — EVIDENCE.

Under supreme court rule 8, subd. 1, errors assigned by an appellant will not be investigated when his brief contains no reference to the pages of the transcript for verification.

In an action of trespass by a lessee to recover damages for the tearing down of a leased building and the removal of the lessee's effects therefrom, evidence of the market value of the building and contents is admissible.

Appeal from Superior Court, Clallam County.—Hon. JAMES G. McCLINTON, Judge. Affirmed.

Action of trespass by plaintiff to recover damages sustained by reason of the tearing down of a building by defendants, of which the plaintiff was the lessee, and the removal of plaintiff's property therefrom. Judgment for plaintiff and defendants appeal.

George C. Hatch, for appellants.

Trumbull & Trumbull, for respondent.

Per Curiam.—Subdivision 1 of Rule VIII of this court is as follows :

"Briefs shall be printed throughout in plain, clear type, and shall contain a clear statement of the case so far as deemed material by the party, with reference to the pages of the transcript for verification."

Appellant's brief in this case is entirely innocent of any such references, and the errors assigned should in reality not be investigated by the court, but inasmuch as the record is small we have looked into it. Under the pleadings in this case and proof adduced, there could have been no other result than a judg-

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ment for plaintiff. The only question was the amount of damages.

We think the court did not err in permitting respondent and witness Byrne to testify in relation to the value of the buildings and contents thereof. Of course the plaintiff could recover only the market value of the property, but it was the market value that the witnesses were testifying to, and we think the record shows that they were plainly competent to testify to that fact.

The other objections to testimony admitted we think are equally without foundation, and finding no error in the instructions of the court the judgment will be affirmed.

[2272. Decided November 28, 1896.]

THE COUNTY OF SNOHOMISH, *Appellant*, v. GEORGE C.
RUFF *et al.*, *Respondents*.

NOTICE OF APPEAL — WHO ENTITLED TO SERVICE — APPEALABLE ORDER
— COUNTY AUDITOR'S BOND — BREACH — LIABILITY OF SURETIES.

The fact that some of the defendants to an action come in, after the rendition of judgment and notice of appeal, and file an answer in the cause, although the same had been previously served on plaintiff's attorney, does not put them in a position requiring notice of appeal to be served on them.

An order granting a motion to strike certain allegations from the complaint is appealable, when it affects a substantial right and determines the action as to the particular matter in issue.

The sureties upon the bond of a county auditor are liable for his failure to account for moneys received as purchasing agent of the board of county commissioners, under statutes providing that the auditor should be *ex officio* clerk of the board and making it his duty as such clerk to perform all the duties required by law or any rule or order of the board, when he has been required by order of the board to act as purchasing agent for them.

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Appeal from Superior Court, Snohomish County.—
Hon. JOHN C. DENNEY, Judge. Reversed.

J. W. Heffner (*J. T. Ronald* and *A. W. Hawks*, of counsel), for appellant:

Where the duties of one office are by law made a part of the regular duties *ex officio* of another, or where the duties of one are such as the incumbent of the first office might naturally and legally be called upon to perform, the bondsmen are liable. *Van Valkenburgh v. Paterson*, 47 N. J. Law, 146; *Hubbard v. Elden*, 43 Ohio St. 380; *Supervisors v. Clark*, 92 N. Y. 391; *State v. Wright*, 50 Conn. 580; *Town v. Grimmenstein*, 9 Pac. 560; *Stevenson v. Bay City*, 26 Mich. 45.

Coleman & Hart, for respondents:

The sureties upon an official bond undertake for nothing which is not within the letter of their contract. The obligation is *strictissimi juris*, and nothing is to be taken by construction against the obligors. They have consented to be bound to a certain extent only, and their liability must be found within the terms of that consent. *Paw Paw v. Eggleston*, 25 Mich. 36; *State v. Cutting*, 2 Ohio St. 1; *McCluskey v. Cromwell*, 11 N. Y. 593; *United States v. Boyd*, Book 10 U. S. Rep. 706 (L. C. P. ed.); *Bell v. Bruen*, Book 11 U. S. Rep. 95 (L. C. P. ed.); *Sanger v. Baumberger*, 51 Wis. 592; *Murfree*, Official Bonds, § 182.

The county commissioners are the business agents of the county, and it is upon them and them alone that the duty devolves of purchasing for the county whatever may be needed to run the government thereof. Gen. Stat., § 281; *Martin v. Whitman County*, 1 Wash. 255, 534; *State, ex rel. Whitney, v. Friars*, 10 Wash. 352.

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Opinion of the Court—SCOTT, J.

As supporting our contention that the allegations of the complaint, against which the motions to strike were directed, do not constitute a cause of action against the sureties, we cite *San Luis Obispo County v. Farnum*, 41 Pac. 445; *Hill v. Kemble*, 9 Cal. 71; *People v. Pennock*, 60 N. Y. 421; *Schloss v. White*, 16 Cal. 66; *United States v. Barnhart*, 17 Fed. 579; *United States v. Boecker*, Book 22 U. S. Rep. 472 (L. C. P. ed.).

The opinion of the court was delivered by

SCOTT, J.—The respondent Ruff was the auditor of Snohomish county, and the other respondents were sureties on his official bond. The county brought an action on the bond, alleging in substance, as one ground for recovery, that said auditor was *ex-officio* clerk of the board of county commissioners, and was required by an order of the board to act as purchasing agent for the county, and that he had received money for that purpose and had failed to account for \$1,818.71.

The respondents moved to strike said allegations from the complaint, which motion was granted by the court, and the county has appealed therefrom. The respondents move to dismiss the appeal upon two grounds, one of which is that the notice of appeal was not served upon all of them.

It is conceded that service of the notice of appeal was made on the attorneys for all of the respondents who had filed answers in the action prior to the giving of such notice, which service was had on the 30th day of March, 1896. The motion to dismiss is based upon the fact that several of the defendants served an answer on the attorney for the county on the 3d day of July, 1895, but the same was not filed until April 6, 1896, after the notice of appeal had been given.

We do not think, under the circumstances, that these defendants were entitled or required to be served with the notice of appeal. They did not contest the action and had not appeared therein previous to the notice, and the mere fact that they came in after the rendition of judgment and notice of appeal to this court and filed an answer in said cause, although the same had been previously served on the attorney for the county, did not place them in a position requiring the plaintiff to serve them with the appeal notice.

It is next contended that it was not an appealable order, but this cannot be sustained, for it affected a substantial right and determined the action as to the particular matter in issue, and was in effect a judgment against the plaintiff thereon. Motion denied.

It is next contended that the aforesaid matters were properly stricken from the complaint on the ground that the sureties were not liable therefor, but this contention cannot be sustained, for the condition of the bond was that the auditor should faithfully perform all of the duties required of him by law, etc., and the law (Gen. Stat., § 179) makes the auditor *ex-officio* clerk of the board of county commissioners. Sec. 181 makes it his duty as such clerk to perform all of the duties required by law or any rule or order of the board, and he was required by the order of the board to act as purchasing agent as aforesaid.

Under the well settled law, the statutes in force at the time relating to the duties of the auditor should be construed as a part of the bond, and it was therefore a condition of the bond that the auditor should faithfully perform all duties required of him by any rule or order of the board of county commissioners.

It may be conceded, as far as this case is concerned, that the commissioners could require of him only

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Dissenting Opinion — GORDON, J.

such duties as were fairly connected with his position as auditor, and as clerk of the board, and could not require of him something that was entirely foreign to his office, and hold his bondsmen liable. For these matters were fairly within the scope of his duties, and we are of the opinion that the county is entitled to recover upon his official bond for any delinquencies therein.

Reversed and remanded.

DUNBAR and ANDERS, JJ., concur.

HOYT, C. J., dissents.

GORDON, J. (*dissenting*).—I am unable to concur with the majority in the disposition made of the motion to dismiss the appeal. The service of an answer in a case constitutes an appearance therein and entitles such answering defendant to notice of all subsequent applications. I do not think that the mere failure of a party to file his answer affords any reason for permitting the party upon whom it has been served to disregard it, but it would seem to logically follow from what is held by the majority that the service of an answer gives such answering defendant no standing in the action until the answer is actually filed. This, it seems to me, is contrary to the spirit of the practice act of March 15, 1893, and opposed to the express provisions of § 37 of that act (Laws, 1893, p. 417). That section is as follows:

“Sec. 37. All pleadings in any civil action shall be filed with the clerk of the court, *on or before the day when the case is called for trial*, or the day when any application is made to the court for an order therein, and in case the moving party shall fail or neglect to cause the pleadings to be filed with the clerk of the court as above required, the adverse party may apply

to the court, without notice, for an order on such moving party to file such pleadings forthwith, and for a failure to comply with such order the court may order the cause dismissed unless good cause is shown for granting an extension of time within which to file such pleadings."

This act permits the summons in a cause to be issued by plaintiff's attorneys and the pleadings therein to be withheld from the public record until the contest actually comes before the court, thus enabling many controversies to be settled and adjusted after action is brought without the publicity attending the filing of the pleadings. It is, I think, substantially the New York practice act, and similar acts prevail in Minnesota, North Dakota, South Dakota, and elsewhere. Section 416, Wait's New York Annotated Code, is as follows:

"The summons, and the several pleadings in an action, shall be filed with the clerk within ten days after the service thereof, respectively; or the adverse party, on proof of the omission, shall be entitled, without notice, to an order from a judge that the same be filed within a time to be specified in the order, or be deemed abandoned."

Sec. 5335 of the Compiled Laws of Dakota, 1887, is an exact reproduction of §416, Wait's Code. The statute in Minnesota requires the pleadings to be filed "on or before the second day of the term for which the cause is noticed." Sec. 5220, Gen. Stat., Minnesota, 1894.

Sec. 37, *supra*, provides the remedy for a party who has been served with a pleading which is not thereafter filed. That remedy is to apply to the court for an order requiring the pleading to be filed, and non-compliance with such an order works an abandonment of the pleading.

[No. 2307. Decided November 28, 1896.]

THE R. WALLACE AND SONS MANUFACTURING COMPANY,
Respondent, v. I. J. SHARICK, *Defendant*, EMPIRE JEW-
ELRY COMPANY, *Appellant*.

ATTACHMENT AND EXECUTION — LEVY — PRIORITIES.

The prior levy by a deputy sheriff of a writ of attachment placed in his hands subsequent to the placing of an execution in the hands of the sheriff, will give the attachment lien priority over the execution.

Appeal from Superior Court, Pierce County.—Hon.
J. C. STALLCUP, Judge. Affirmed.

White, Munday & Fulton, and *Sapp & Lysons*, for ap-
pellant.

Murray & Christian, for respondent.

The opinion of the court was delivered by

DUNBAR, J.—A writ of execution had issued on a judgment in favor of the appellant against I. J. Sharick, the defendant in this action, and had been placed in the hands of the sheriff. No levy had been made under this writ. Subsequent to the issuance of the execution the respondents sued out a writ of attachment, which was placed in the hands of the deputy sheriff for levy. The goods in dispute were discovered by the respondent, and pointed out to the deputy sheriff with instructions to levy upon the same, and were levied upon by virtue of the writ of attachment. While the property was thus held, before any sale had been made, a receiver was appointed for said property, under stipulation of all the parties that the said property should be surrendered by the sheriff to the receiver, with the express reservation and understanding that no writ or lien of any party thereto should thereby

be impaired or prejudiced in any manner, but that the lien secured upon said property should continue on said property or attach to the proceeds of said property in like manner as if it had remained in the possession of, and had been converted into cash by, the sheriff.

Thereafter, under direction of the court the property was sold by the receiver and converted into cash. The appellant petitioned the court to give priority to its writ in the distribution of the proceeds. This petition was denied, and a final order of distribution made, giving priority to the writs of attachment which had come into the sheriff's hands subsequent to the issuance of the execution, one of said writs being the writ of the respondent in this case.

The only error assigned is the refusal of the court to give priority in the distribution of the proceeds to appellant's writ of execution; so that the question presented is, Did the writ of execution have priority over the writs of attachment under which the property was levied upon?

We think the court did not err in overruling the appellant's petition. This case falls squarely within the rule announced in *Meacham Arms Co. v. Strong*, 3 Wash. T. 65 (13 Pac. 245), and is in no way affected by the decision in *Wunsch v. McGraw*, 4 Wash. 72 (29 Pac. 832). It is admitted by the appellant that in a case of this kind its remedy would be against the sheriff, if the writs had taken their usual and ordinary course, but that its remedy against the sheriff would not be by wrongful levy of the writs, but by reason of the improper distribution of the proceeds of the property, (citing *Freeman on Executions*, §196), and that inasmuch as the distribution of the proceeds in this case was a matter to be decided by the court

and not by the sheriff, its remedy against the officer would fail.

We think the appellant has mistaken the force of the case cited by Freeman, *supra*, and that the rule would apply only to cases where liens had been established by prior levies. But, however that may be, the duty of the sheriff is prescribed by statute in this state, and § 298, Code Proc., provides that where there are several attachments against the same defendant they shall be executed in the order in which they were received by the sheriff, so that the breach of duty by the sheriff occurred, if it occurred at all, prior to the possession of the property by the court through the receiver, and he would be liable, if liable at all, for not levying the writs in the order in which they were received.

It might well be that a writ of execution might be placed in the hands of the sheriff with instructions not to serve it, as it has been in many cases, or it might be that the sheriff might demand an indemnifying bond before he would feel justified in levying upon property, and, in such event, the refusal of a judgment creditor to furnish such indemnity could not prevent the attaching of the lien of some subsequent judgment creditor.

Under the pleadings in this case, and taking the averments of the answer to the petition to be true, as we must from the fact that there is no statement of facts accompanying this case, and the court must be presumed to have acted in accordance with the testimony, we are unable to conclude that the court erred in denying appellant's petition.

Affirmed.

HOYT, C. J., and SCOTT, ANDERS and GORDON, JJ.,
concur.

[No. 2057. Decided November 30, 1896.]

F. S. POTVIN *et al.*, Respondents, v. A. WICKERSHAM
et al., Appellants.

MECHANIC'S LIEN — EXEMPTION OF MATERIAL FURNISHED FROM JUDG-
MENT LIENS AGAINST OWNER.

The fact that a material man, who has furnished building material to a contractor, has filed notice of lien against the owner of the building in which it is to be used, will not, when the lien claim has not been paid, vest the title to such material in the owner of the building so as to render it liable to execution on judgments against him.

Under Gen. Stat., §1675, exempting from execution material designed in good faith to be used in the construction of a building, such material will be exempt, although the completion of the building has been delayed for a number of years pending litigation, and whether the material is to be used by the one engaged in the construction of the building at the time of its purchase or by one succeeding to his rights.

Appeal from Superior Court, King County.—Hon.
J. W. LANGLEY, Judge. Affirmed.

Charles E. Shepard, for appellants.

Blaine & DeVries, for respondents.

The opinion of the court was delivered by

SCOTT, J.—This is an appeal from an order granting a motion for an injunctive order and continuing a restraining order previously issued, based upon substantially the following facts. The Denny Hotel company was constructing a hotel in the city of Seattle. The respondent Potvin was the contractor for the erection of the building. Huttig Brothers Manufacturing Company furnished certain materials for the buildings, which were then upon the ground ready to be used; and the respondents Dexter Horton & Co., by virtue

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of an arrangement with the contractor, were entitled to be subrogated to his rights. Work on the hotel had been suspended for a considerable length of time in consequence of litigation affecting it, one suit being by the contractor to enforce a lien against the building. The appellant Wickersham was the architect of the building, and had obtained a judgment for his claim and levied it upon the materials furnished for the building by Huttig Brothers Manufacturing Company, and the orders aforesaid restrained him and the sheriff from proceeding to sell the property.

The appellant's contention is based upon two grounds, the first of which is that the hotel company was the sole owner of the materials and that none of the plaintiffs had any title thereto. In support of this it is contended that, although the material in question was ordered or purchased by Potvin, he did so as agent for the hotel company, and that the hotel company became the owner thereof, especially in view of the fact that Huttig Brothers Manufacturing Company had sought and obtained a lien against the building therefor. This lien claim, however, had not been paid.

It seems to us that this contention cannot be maintained, for the lien given to material men by the statute in such cases is a cumulative remedy, and it is provided (Gen. Stat., § 1676) that it should not be construed to impair or affect the right of material men to maintain a personal action against the person liable therefor, and Huttig Brothers Manufacturing Company could maintain an action against Potvin, the contractor, for the price of these materials furnished to him, notwithstanding the fact that they had a right to, and had sought to enforce, a lien against the building therefor.

It appears that the materials in question had been

gotten out especially for the building and were of little value except for the purposes for which they were designed. The statute (§ 1675) exempts materials from seizure under attachment or execution so long as they are in good faith designed to be used in the construction of the building, unless it be upon a claim for the purchase money; and one ground of contention in this case was that the materials were intended to be used in the completion of the building, and whether this was to be done by the hotel company, or by the one succeeding to its rights upon the determination of the litigation pending, is immaterial, nor would the fact that this litigation had been pending for a number of years affect that question or necessarily require a finding that there was no intention to use the materials in the completion of the building. This was a question of fact to be determined upon the proofs, and after an examination of the proofs submitted we think the court was warranted in finding that the materials were in good faith intended to be applied to the completion of the building.

Affirmed.

ANDERS, DUNBAR and GORDON JJ., concur.

[No. 2243. Decided November 30, 1896.]

GUSTAVE MELBYE, *Appellant*, v. OSKAR MELBYE, *Respondent*.

CHATTEL MORTGAGES—FRAUD AS TO CREDITOR—IN PARI DELICTO.

In an action to foreclose a chattel mortgage given without consideration and for the purpose of hindering and defrauding creditors, the court is warranted in finding that the parties are not *in pari delicto*, and that the mortgagor is entitled to a cancellation of the

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mortgage, when it appears that the parties were brothers born in Norway, that the mortgagee had resided in this country a great many years, was well educated, understood the English language and had had large experience in business affairs; that the mortgagor had resided here a much shorter time, had an imperfect understanding of the English language and of business matters, had always relied upon his more experienced brother, and had confidence in his honesty, integrity and business ability; and that the mortgagor had been unduly influenced and imposed on by the mortgagee as to the necessity for executing such an instrument, but that no fraud had been practiced, attempted or intended against his creditors.

Appeal from Superior Court, Skagit County. — Hon. HENRY MCBRIDE, Judge. Affirmed.

Million & Houser, for appellant.

Carr & Preston, and *W. R. Bell*, for respondent:

It is well settled that when the parties are not equally guilty, or when the public interest is advanced by allowing the more excusable of the two to sue for relief, the court will aid the injured party by setting aside the contract and restoring him, so far as possible, to his original position. *Duval v. Wellman*, 124 N. Y. 156; *Foley v. Greene*, 14 R. I. 618 (51 Am. Rep. 419); *Reynell v. Sprye*, 1 DeG., M. & G. 660; *Hess v. Culver*, 77 Mich. 598 (18 Am. Rep. 421); *Beach*, Modern Equity Jurisprudence, § 80; *Rozell v. Vansyckle*, 11 Wash. 79.

The opinion of the court was delivered by

SCOTT, J.—The complaint in this action was in the ordinary form to foreclose a chattel mortgage and to recover upon a promissory note for \$500, which the mortgage was given to secure. The answer admitted the execution of the note and mortgage, but alleged a want of consideration; and by way of a cross-complaint the defendant alleged that, on the same day

but prior to the execution of the note and mortgage aforesaid, the defendant had given the plaintiff another note for \$478, secured also by a chattel mortgage upon the same property. It was conceded that this mortgage was valid. It appears that the defendant at that time was engaged in the mercantile business and one of his creditors was pressing him for payment of a debt due, and he obtained the money for which the last mentioned note and mortgage were given for the purpose of discharging it. It is further alleged in substance that thereafter on said day the plaintiff represented to the defendant that he was in danger of being prosecuted by other creditors, and he advised the defendant to give him another note and a mortgage upon the same property for the purpose of protecting him against such creditors, and agreed that he would never undertake to enforce the same and would surrender it to him when his other creditors were paid, or he was relieved from danger of being proceeded against by them. The court afterwards permitted the answer to be amended upon the trial, to set up in substance that thereafter, upon like representations, the defendant also executed to the plaintiff two real estate mortgages upon lands in Skagit county. The payment of a certain sum on the note secured by the mortgage admitted to have been given for a valuable consideration was pleaded, and also a tender of a sufficient sum to discharge the same; and the defendant asked that all of such mortgages be canceled. Judgment was rendered in favor of the defendant upon his cross-complaint, and the plaintiff has appealed.

It is contended that the court had no authority to grant the defendant any affirmative relief; not on the ground that such relief could not be granted in the

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action pending, as having no sufficient relation thereto, but on the ground that the proof did not support the findings and that the testimony showed that the defendant had given the chattel mortgage sought to be foreclosed and the real estate mortgages for the purpose of covering up his property and defrauding his creditors; that the parties were *in pari delicto*, and that, under this view of the case, the most the court could have done was to have dismissed the plaintiff's complaint.

It appears from the testimony that the parties were brothers, and that they were born in Norway; that plaintiff had resided in this country for a great many years and was well educated, understood the English language and had had large experience in business affairs; while the defendant had resided here for a much shorter time and had a very limited education and an imperfect understanding of the English language and of business matters, and that he had always relied upon his brother, the plaintiff, and had confidence in his honesty, integrity and business ability. And, while the general rule contended for by appellant is conceded, it is contended that this case does not fall within it, as the parties were not equal in guilt, and the defendant is the more excusable of the two, if found to have been consciously guilty at all, and that the law will not deny him relief against the one who unduly influenced and imposed upon him and was principally responsible for the fraudulent undertaking. This limitation of the rule is well established by the authorities, and has been directly recognized by this court in the case of *Rozell v. Van Syckle*, 11 Wash. 79 (39 Pac. 270). It does not appear that there was any intention on the part of the defendant to defraud his creditors. The only money that he

obtained from his brother was obtained for the purpose of paying one of them, and was used for that purpose. There was no evidence to show that any of his other creditors were pressing him for payment, and the court was warranted in finding that he was induced to give the mortgages upon the representations, influence and advice of the plaintiff; and there was sufficient proof to support the other findings.

Affirmed.

DUNBAR, ANDERS, and GORDON, JJ., concur.

15 652
16 677

15 652
29 649

[No. 2317. Decided November 30, 1896.]

A. R. TITLOW, *Receiver, Respondent*, v. CASCADE OAT MEAL COMPANY *et al.*, *Defendants*, N. C. RICHARDS, *Administrator, Appellant*.

FRAUDULENT CONVEYANCE — ACTION TO SET ASIDE — SUFFICIENCY OF COMPLAINT — ACTION BY RECEIVER — PROOF OF AUTHORITY.

Technical objections to the form rather than to the substance of a pleading alleging fraud will be disregarded after judgment, when the case has been fully tried upon the issue.

In an action by a receiver, failure to introduce in evidence the order appointing him will not entitle defendant to a non-suit, when the plaintiff testifies without objection that he is such receiver, and the action is instituted in the court which had appointed him receiver, and there is no showing of want of authority to bring suit.

Appeal from Superior Court, Pierce County.—Hon. JOHN C. STALLCUP, Judge. Affirmed.

Richard Saxe Jones, for appellant.

Bogle & Richardson, and *A. R. Titlow*, for respondent.

The opinion of the court was delivered by

SCOTT, J.—This action was brought to set aside an

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alleged fraudulent transfer of a mortgage given by the Cascade Oat Meal Company to the Tacoma Trust and Savings Bank, and assigned by the bank to appellant Richards as administrator of the estate of David C. Humphreys. A decree was rendered in favor of the plaintiff, and said administrator has appealed.

It is first contended that the court erred in refusing to grant the appellant's motion for a judgment on the pleadings on the ground of the insufficiency of the allegations of fraud. The objections raised relate more to the form than the substance of the allegations, and as the case was fully tried upon that issue technical questions not now affecting the merits will not be regarded.

It is next contended that the court erred in refusing to grant the appellant's motion to dismiss the cause on the ground that there was no proof of the plaintiff's authority to sue, but it appears that the plaintiff testified that he was receiver of the Tacoma Trust and Savings bank and of the Bank of Tacoma, and this testimony was given without any objection, and the appellant will not now be heard to question its competency and to urge that the order appointing him should have been introduced in evidence. As receiver the plaintiff *prima facie* had authority to bring the action under § 331, Code Proc., and, as the action was brought and prosecuted to judgment in the court which had appointed him receiver, it was clearly under the control of the court. There was no counter-showing as to the authority of the receiver to bring suit.

The appellant most strongly contends that the case should be decided otherwise on the merits, but after considering the arguments of counsel and examining the evidence, we are of the opinion that the findings

of the court are well supported and entitle the plaintiff to the relief given.

Affirmed.

DUNBAR and ANDERS, JJ., concur.

[No. 2323. Decided November 30, 1896.]

THOMAS JOSE, *Appellant*, v. B. E. LYNCH, *Respondent*.

PARTNERSHIP—ACTION FOR ACCOUNTING—DECREE—PLEDGE—SUFFICIENCY OF EVIDENCE.

In an action between two partners for an accounting, the court has no authority to make provision for the payment of the individual debt of one of the partners by reason of the fact that he had pledged certain personal property, which had been loaned to the partnership, to the other partner to indemnify him as surety for the payment of such individual debt.

One claiming certain horses as pledgee thereof fails to establish such title in himself by proof that the horses had been delivered to a logging partnership of which he was a member, for its use, and that he had come into possession of the horses as manager of the partnership business, there being no proof that the property had ever been delivered to him as pledgee, although there was proof of an agreement to pledge same to him.

Appeal from Superior Court, King County.—Hon. RICHARD OSBORN, Judge. Modified.

Brady & Gay, for appellant.

The opinion of the court was delivered by

DUNBAR, J.—This action was brought by the plaintiff for the dissolution of the partnership between himself and defendant; for the return to the plaintiff of his own individual and personal property, the use of which he had given to the partnership for the log-

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ging of a certain tract of land, and for the appointment of a receiver.

According to the allegations of the complaint the plaintiff and defendant entered into a contract of co-partnership on the 1st day of June, 1894. By the terms of the contract the plaintiff was to furnish horses and "rigging" necessary for the carrying on of the logging of a certain tract of land; defendant was to furnish \$1,500 for the purchase of the timber, and they were to share equally the profits of the business. In accordance with the terms of the agreement the plaintiff did furnish three span of horses, constituting a logging team. The defendant was the active manager of the business, but failed to render accounts to the plaintiff and failed to recognize the rights of the plaintiff in said co-partnership. That portion of the answer necessary to be noticed here was to the effect that on the second day of May, 1894, the plaintiff procured defendant and his wife to become sureties for him upon a certain appeal bond; that soon after the execution and filing of the said bond the defendant discovered that the plaintiff was in embarrassed financial circumstances, and that becoming alarmed for the safety of himself and wife as sureties upon said bond he demanded of the plaintiff an indemnity against any loss or damage which he or his wife might sustain because of the said suretyship; and that in response to said demand, plaintiff agreed to deliver to the defendant eight head of horses as security to indemnify and save himself and wife harmless from such loss or damage which they might sustain by reason of their said suretyship.

The plaintiff moved for the appointment of a receiver. Upon said motion the court appointed a receiver to take charge of all the assets of the part-

nership, and also to take charge of the personal property of the plaintiff, the use of which the plaintiff had furnished to said copartnership.

The court, in its findings of fact, found substantially the matters alleged in the complaint, viz., the agreement as alleged; that in accordance with the terms of the agreement the plaintiff furnished the horses and such rigging used with teams necessary for the carrying on of said business, describing the three teams of horses furnished; the fact that the said horses were to be returned to the plaintiff upon the termination of the logging contract; that the defendant refused to recognize the rights of the plaintiff, contrary to the terms and conditions of their agreement; that the defendant attempted to appropriate to his own use certain debts due said copartnership, and the fact that there was owing to the partnership from the defendant the sum of \$567.44; and as a conclusion of law decreed that the defendant should pay into said partnership said sum of \$567.44, and such additional sum, not to exceed \$1,500 (which was the amount advanced by the defendant for the purchase of the timber), as might be necessary to pay all the outstanding debts of the copartnership, and all of the debts and expenses of the receiver of the said business; and that a decree be entered ordering the receiver to deliver back to their respective owners each and all of the personal property delivered by the said parties to the said copartnership, the title to which remained in the said parties, except the three spans of horses, which said horses are to be held for the defendant B. E. Lynch until further order of the court, and to be delivered to him upon the payment by him of the bond described in defendant's answer.

It is earnestly contended by the appellant that the

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amount found due by the court from the respondent was not the true amount due, but from an investigation of the record we think we would not be warranted in disturbing this finding. The court, however, made an order that the defendant Lynch have ten days from January 11, 1896, within which to satisfy the claim of the Merchants' National Bank of Seattle (which was the judgment appealed from mentioned in the answer, and for the payment of which respondent had become surety), and that, upon the payment by Lynch of the claim of the Merchants' National Bank, thereupon the receiver should re-deliver the horses above mentioned to enable the respondent Lynch to resort thereto and to the pledge thereof to indemnify him respecting such loss or damage as he might sustain in the satisfaction of said claim. And it was further ordered that, if he failed within said period to satisfy said claim so as to entitle him to the re-delivery of said property as aforesaid, then leave was granted to said Merchants' National Bank, or the receiver thereof in whose possession the assets thereof then were, to take such action as to him should seem meet and proper to satisfy said claim in whole or in part out of the proceeds of the sale by him of said property (viz., the horses aforesaid), and to subject said property to the satisfaction thereof in whole or in part.

This order of the court we think was plainly erroneous and could not be sustained by the facts as found by the court. The Merchants' National Bank is not a party to this action. This was an action of accounting between the appellant and respondent, and we think the court had no authority to make provision for the payment of an individual debt of one of the partners in this action. The order was probably made

on the theory that the property had been pledged by the appellant to the respondent for the payment of this debt, and that if the appellant were allowed to regain possession of it the respondent would be left without a remedy. But even with that view of the case, all the court, it seems to us, would have the power to do would be to establish the lien of the respondent on this property, to be subjected by him as the law provides; but in no event could the court go so far as to order the property sold and the proceeds applied to the payment of a judgment, the parties to which are not parties to this action and have not appeared therein in any manner. Especially is this true in view of the further finding of the court that this property was exempt from execution, or a finding of the facts which would constitute an exemption. Finding 12 is as follows:

“That the plaintiff is a person engaged in the business of logging for his support and that of his family and that the said three spans of horses, rigging and other articles, the use of which the plaintiff turned into the copartnership of Lynch & Jose, is the only logging team owned by the plaintiff, and by the use of the said three spans of horses as a logging team the plaintiff must earn the support of himself and family.”

Neither do the findings of fact nor the testimony in this case show that a delivery of the pledge was ever made by the appellant to the respondent of these horses. The finding of the court in regard to that is as follows:

“That at the time of the execution and delivery of said bond, the plaintiff agreed to deliver to the defendant eight horses as an indemnity to secure the defendant and his wife upon the bond against any loss or damage which they might sustain by reason of becoming sureties on said bond. That the said three

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spans of horses were delivered to the firm of Lynch & Jose on or subsequent to the 1st of June, A. D., 1894, and the said B. E. Lynch was managing the said copartnership business, and as such manager of the firm of Lynch & Jose got possession of the said horses and has since held the said horses in his possession as a pledge to secure him upon the said bond."

Now, if the horses were delivered to the firm of Lynch & Jose, they were not delivered to Lynch as a pledge to secure him upon the bond; and as long as he was acting in the capacity of manager for the copartnership, the possession of the horses was in him as manager and not as an individual. It seems to us plain that these horses never were delivered to respondent Lynch, and that, not having been delivered, the appellant was entitled to them under the exemption laws and under the other findings of fact in this case; and that the order of the court both as to the turning of the said horses over to the respondent as an indemnity, and as to subjecting their proceeds to the payment of the judgment formerly obtained against Jose by the Merchants' National Bank, was wrong.

The judgment will, therefore, be reversed with instructions to modify the same as indicated by this opinion, and, as so modified, it will be affirmed. Costs to appellants in this court.

SCOTT and ANDERS, JJ., concur.

[No. 2334. Decided November 30, 1896.]

FRANK SPRENGER, *Respondent*, v. THE TACOMA TRACTION COMPANY, *Appellant*.

CARRIERS — WRONGFUL EJECTION OF PASSENGER — EVIDENCE.

In an action to recover for wrongful ejection from a street car for alleged non-payment of fare, it is not error to refuse the admission of evidence on the part of defendant showing that plaintiff had been put off a railroad train for non-payment of fare, for the purpose of showing that he was in the habit of avoiding payment of car fare.

Where a witness has testified positively to a fact it is not competent for the party introducing him to elicit from the witness a statement as to the reasons which led him to come to the conclusions to which he has testified.

The fact that a passenger ejected from a car for alleged non-payment of fare could have prevented his ejection by surrendering to the conductor another ticket which he had in his possession, would not reduce the damages growing out of the wrongful act of the conductor to the sum represented by the value of the ticket, when the evidence shows that, with the delay of a few minutes, the conductor could have made an investigation which would have definitely determined whether or not the plaintiff had paid his fare.

Appeal from Superior Court, Pierce County. — Hon. W. H. PRITCHARD, Judge. Affirmed.

Doolittle & Fogg, for appellant:

If an issue of fact be raised, whether a party has been guilty of an illegal and wrongful act, implying moral turpitude on the part of the accused, it is permissible to give in evidence such former act, on his part, as will show, or tend to show, his capacity, ability or aptitude to do the thing complained of; that he has a dishonest disposition, or that his habit of rectitude and his moral sense are not sufficiently strong to preclude his doing a wrongful and immoral act of like

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kind and character with that with which he is charged. And this is true, although there is no pretense or claim that proof of such an act, standing alone, goes directly to prove the commission of the ultimate fact of which he stands accused. *Commonwealth v. Merriam*, 14 Pick. 518 (25 Am. Dec. 420); *Commonwealth v. Lahey*, 14 Gray, 91; *Commonwealth v. Pierce*, 11 Gray, 447; *Thayer v. Thayer*, 101 Mass. 111 (100 Am. Dec. 110); *People v. O'Sullivan*, 104 N. Y. 484 (58 Am. Rep. 530); *People v. Dimick*, 107 N. Y. 32; *Brown v. State*, 26 Ohio St. 182; *State v. Ward*, 61 Vt. 185; *State v. Knapp*, 45 N. H. 148; *Copperman v. People*, 56 N. Y. 591; *Wood v. United States*, 16 Pet. 342; *Faucett v. Nichols*, 64 N. Y. 383; *Friend v. Hamill*, 34 Md. 298; *Commonwealth v. Robinson*, 146 Mass. 571; *Commonwealth v. Hill*, 145 Mass. 310; *State v. Lee*, 60 N. W. 119; *Parkinson v. Nashua, etc., R. R. Co.*, 61 N. H. 416; *Plummer v. Ossipee*, 59 N. H. 55; *Baulec v. New York, etc., R. R. Co.*, 59 N. Y. 356 (17 Am. Rep. 325); *Texas Mexican Ry. Co. v. Douglas*, 73 Tex. 325; *Bower v. Chicago, etc., Ry. Co.*, 61 Wis. 457; *Lee v. Lee*, 3 Wash. 236.

It was permissible to show by the witness Hargis, what was his usual course of business in taking up fares, his purpose and motive in so doing as he did, and what led him to stop at the third woman on the right hand seat, in taking up fares, before crossing over to take up those on the left. The intent or motive with which a thing is done, or omitted to be done, may be shown, when material, by the testimony of the party who did it, even though the plaintiff had no means of determining whether in that regard he testified truly or not. *Flower v. Brumbach*, 30 Ill. App. 296; *Stearns v. Gosselin*, 58 Vt. 38; *Jefferds v. Alvard*, 151 Mass. 95; *Elmer v. Fessenden*, 151 Mass.

361; *Miner v. Phillips*, 42 Ill. 123; *Hulett v. Hulett*, 37 Vt. 581; *Fisk v. Chester*, 8 Gray, 506; *Thacher v. Phinney*, 7 Allen, 146; *Wheelden v. Wilson*, 44 Me. 11; *Commercial Bank v. Fireman's Ins. Co.*, 58 N. W. 391; *Harrison v. State*, 25 S. W. 284; *Danforth v. Carter*, 4 Iowa, 230; *Sweet v. Tuttle*, 14 N. Y. 465; *Yerkes v. Salomon*, 11 Hun, 471; *Cortland County v. Herkimer County*, 44 N. Y. 22; *Fiedler v. Darrin*, 50 N. Y. 437; *McKown v. Hunter*, 30 N. Y. 625; *Starin v. Kelly*, 88 N. Y. 418.

One damnified by reason of the accident, mistake or tort of another is bound, no less in law than in morals, to make the scope of the injury as narrow, and the extent of the damage as small as he conveniently, readily and reasonably can, and the court's refusal to so instruct the jury, and his own voluntary instruction to the contrary, was wanting in authority of law. 5 South. Law. Rev. 831; *Hordern v. Dalton*, 1 Car. & P. 181; 2 Starkie, Evidence, p. 741; *Cincinnati, etc., R. R. Co. v. Rodgers*, 24 Ind. 103; *Mather v. Butler County*, 28 Iowa, 253; *Wicker v. Hoppock*, 6 Wall. 94; *Warren v. Stoddart*, 105 U. S. 224; *Bagley v. Rolling Mill Co.*, 22 Blatchf. 342; *The Oregon*, 5 C. C. A. 229; *Heavilon v. Kramer*, 31 Ind. 241; *State v. Powell*, 44 Mo. 439; *Miller v. Roy*, 10 La. An. 231; *Dufort v. Abadie*, 23 La. An. 280; *Miller v. Mariner's Church*, 7 Greenl. 51 (20 Am. Dec. 341); *Davis v. Fish*, 1 Iowa (Greene), 407 (48 Am. Dec. 387); *Loker v. Damon*, 17 Pick. 284; *Milton v. Hudson River Steamboat Co.*, 37 N. Y. 210; *Louisville, etc., R. R. Co. v. Breckinridge*, 34 S. W. 702.

While the negligence of the injured person, contributing proximately to his injury, will bar the recovery of damages, it is held that, when he was guilty of no negligence contributing to the wrong com-

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plained of, and yet there were negligent, wilful or intentional acts, or omission to act, upon his part after the wrongful act, by which it was aggravated, increased or enlarged, they will not prevent him from recovering damages for so much of the injury as the original wrongdoer caused by his negligence. *Shearm. & R., Negligence*, § 32 and note; *Beach, Contributory Negligence*, 64; *Stebbins v. Central Vt. R. R. Co.*, 54 Vt. 464 (41 Am. Rep. 855); *Greenland v. Chaplin*, 5 Exch. 243; *Thomas v. Kenyon*, 1 Daly, 132; *Sills v. Brown*, 9 Car. & P. 601; *Secord v. St. Paul, etc., Ry. Co.*, 18 Fed. 221; *Louisville, etc., Ry. Co. v. Falvey*, 104 Ind. 409. In such cases the damages may be apportioned, and a deduction made by the jury for that portion of the injury due to plaintiff's fault or omission. *Gould v. McKenna*, 86 Pa. St. 297 (27 Am. Rep. 705); *Nitro Phosphate Co. v. Docks Co.*, L. R. 9 Ch. Div. 503; *Hunt v. Lowell Gas Co.*, 1 Allen, 343; *Sherman v. Fall River Iron Co.*, 2 Allen, 524 (79 Am. Dec. 799); *Matthews v. Warner*, 29 Grat. 570 (26 Am. Rep. 396); *Hibbard v. Thompson*, 109 Mass. 286; *Fay v. Parker*, 53 N. H. 342 (16 Am. Rep. 270); and, in this view, the court should award respondent just what he could have retained his seat for to the end of his trip. *Sandwich v. Dolan*, 34 Ill. App. 205; *Ford v. Illinois, etc., Co.*, 40 Ill. App. 226; *Akridge v. Atlanta, etc., R. R. Co.*, 90 Ga. 232; *Terry v. New York Central R. R. Co.*, 22 Barb. 574; Reynold's Stephen's Evidence, p. 19, art. 11, and cases cited. This rule applies in cases *ex contractu* as well as in cases *ex delictu*. 7 Am. & Eng. Enc. Law, p. 62 and notes.

Frank D. Nash, for respondent.

The opinion of the court was delivered by

HOYT, C. J.—Defendant was operating a street car

line in the city of Tacoma, and plaintiff was a passenger on one of its cars. He was ejected therefrom by the conductor for the alleged non-payment of his fare, and brought this action to recover damages, claiming that he had paid his fare and that he was unlawfully ejected. The trial resulted in a verdict for \$100 damages, upon which judgment was duly rendered.

In its brief defendant has discussed the alleged errors of the trial court under numerous heads, but for the purposes of this opinion they can be so grouped as to present but four distinct propositions. Of these, two relate to the rejection of testimony offered on the part of the defendant; the third, to instructions given to the jury and refusals to instruct, and the fourth, to the measure of damages.

Plaintiff having testified that he had paid his fare and that thereafter he had been compelled to leave the car by the action of the conductor and motor-man, was asked by defendant's counsel if he had not been put off of the street cars before for refusal to pay fare. This question he answered in the negative. Whereupon he was asked if he had not been put off the Northern Pacific railroad cars for non-payment of fare. Upon objection of the plaintiff, the court refused to allow him to answer, and it is claimed that in so doing it committed error. A large number of cases have been cited to show that it is competent to prove that one has been guilty of a certain offense by proof of the commission of other offenses of the same nature. But in our opinion none of these cases are applicable to the question here presented. The fact that plaintiff had had trouble about the payment of his fare upon a railroad train would bear so remotely upon the question as to his attempting to beat the

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street car out of a five cent fare, that it was properly excluded from the consideration of the jury. The ruling of the court, which allowed the defendant to attempt to show that the plaintiff had had trouble about the payment of fare upon street cars, was as favorable to the defendant as it could ask.

The conductor, having testified that he collected fare on the side of the car upon which the plaintiff was sitting up to and including that of a woman sitting next to him before he left that side to collect fares upon the other, and that when he returned to the side from which he first collected fares he sought to collect the fare of the plaintiff, was asked by defendant's counsel a question which sought to elicit from the witness a statement as to the reasons why he was sure he had left off collecting, upon the side of the car upon which the plaintiff sat, with the woman who sat next to him. The objection of plaintiff to this question was sustained, and it is claimed that in sustaining it the court committed error. In determining as to the correctness of this ruling it must be remembered that the question was put by defendant to its own witness, that he had testified positively to the fact that plaintiff had not paid his fare, and that he had left off collecting upon that side with the woman sitting next to plaintiff. This being so it was not competent for defendant to bolster up the testimony of its own witness by asking for the reasons which had led him to come to the conclusions to which he had testified. It might have been competent for the plaintiff in cross-examination to have gone into this question, but until this was done the testimony, when offered upon the part of the defendant, was properly excluded.

It will not be necessary to notice in detail the ex-

ceptions to the instructions, for the reason that such exceptions are founded largely upon questions going to the measure of damages, which will be hereinafter considered. It will be sufficient to say that, in view of the measure of damages as to which under the evidence we think the jury should have been instructed, the instructions sufficiently and correctly stated the law of the case.

It appeared from the uncontradicted testimony that the plaintiff had several other tickets one of which he could have used in payment of his fare, and thus have prevented his ejection for not paying; and it is earnestly contended on the part of the defendant that, under the well settled rule that it is the duty of one who has been deprived of a contract right to reduce the damages flowing from the violation of the contract as much as possible, it was the duty of the plaintiff to have used one of the tickets in his possession, by doing which he would have reduced the damages growing out of the wrongful act of the conductor to the sum represented by the value of the ticket. The general rule contended for by the defendant is unquestioned, and it may be conceded that thereunder the defendant would only have been liable in such an amount of damages as was necessarily imposed upon the plaintiff by its wrongful action, if such wrongful action had not been committed by it under circumstances which showed a disregard for the rights of the plaintiff. If no evidence had been introduced tending to show that there had been a want of care and investigation on the part of the conductor before he acted upon the claim that plaintiff had not paid his fare, there might be reason for the application of the rule contended for, though many of the cases hold that such a rule is not applicable to a contract of carriage by a common

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carrier with a passenger. But there was evidence sufficient to go to the jury to show that there had been such a disregard of the rights of the plaintiff as to deprive the defendant of the benefit of this rule, even if it applied to cases of this kind. The undisputed proof showed that, with the delay of a few minutes, the conductor could have made an investigation which would have definitely determined whether or not the plaintiff had paid his fare. And in view of the plaintiff's claim that he had paid it, which claim was supported by the statements of at least two of his fellow passengers, good faith required that such investigation should have been made before making the definite charge that plaintiff was attempting to beat his way over the road and enforcing such charge by his expulsion from the car. In view of the action of the conductor, the plaintiff was placed in such a position that it was not his duty to use another ticket and thus tacitly admit that he had been guilty of trying to beat the company as claimed by the conductor. This being so, the instructions as to the measure of damages were what they should have been, and the evidence was such that the verdict for \$100 was not excessive.

The judgment will be affirmed.

DUNBAR, SCOTT, ANDERS and GORDON, JJ., concur.

[No. 2346. Decided November 30, 1896.]

THE STATE OF WASHINGTON, *on the Relation of Amsterdamsch Trustees Kantoor*, v. SUPERIOR COURT OF SPOKANE COUNTY AND NORMAN BUCK, *Judge*.

PROHIBITION—JURISDICTION OF SUPREME COURT—WHO MAY APPLY—
ILLEGAL CORPORATION—QUO WARRANTO AGAINST—APPOINTMENT
OF RECEIVER.

Under the constitution of this state the supreme court has jurisdiction to issue writs of prohibition to restrain the superior courts from proceeding without, or in excess of, jurisdiction, and the supreme court is not restricted in the exercise of such power merely to cases where it may be necessary in aid of its appellate jurisdiction.

The superior court has no power to appoint a receiver for a corporation, upon the institution by the state of *quo warranto* proceedings seeking to oust it from the exercise of corporate powers, since, under the provisions of Code Proc., § 689, authority to appoint receivers in such cases is specially provided in event of judgment against the corporation.

Whether the corporation is one *de jure* or merely *de facto*, it is entitled to the possession of its property until deprived thereof by the judgment of a court of competent jurisdiction, and the question of corporate existence cannot properly be raised in a prohibition proceeding, which seeks to restrain the action of the superior court in appointing a receiver in excess of its jurisdiction.

Original Application for Prohibition.

Binkley, Taylor & McLaren, and *Graves, Wolf & Graves*, for relators.

Cyrus Happy, for respondents.

The opinion of the court was delivered by

ANDERS, J.—On September 5, 1896, the prosecuting attorney of Spokane county, upon his own relation, filed an information in the superior court of that county against Simon Oppenheimer and others, in-

15	668
15	701
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32	53

cluding the relator herein, alleging that the defendants were acting as a corporation within this state, under the name and style of the Northwestern Milling & Power Company, without being legally incorporated, and setting up certain facts showing that they had failed to comply with the law in relation to corporations and had no right to act as a corporation within the state, and praying, among other things, for the appointment of a receiver of the property, effects and assets held, or at any time claimed to be held, by said alleged corporation, with the usual powers of receivers in such cases. Upon the filing of the information, the court, pursuant to the prayer of the relator, appointed one Fowle as receiver of the property described therein. By the terms of the order all persons in possession of any of said property were commanded to deliver the same to the receiver so appointed, "in fear of the pains and penalties attached to the contempt of this court, upon whatever pretense of authority, court or judicial action, such persons may claim the right to, or interest in, the premises, and any person or persons asserting any lien or claim to or interest therein are hereby remanded to this court herein for the assertion or protection of any alleged claim or rights in the premises."

The relator herein, claiming to be in possession of certain of the property over which the receiver was appointed, and of which he was directed to take possession, and claiming to hold the same as a purchaser at a judicial sale under a decree of the superior court of Spokane county, appeared specially by counsel and suggested to the court that the order for a receiver was void and of no effect in so far as it directed the receiver to take possession of the property alleged in

the information to have been transferred to the Northwestern Milling & Power Company by the Spokane Water Power Company, on May 20, 1895, and thereafter, by said company, mortgaged to the relator herein, and by it purchased at a sale on foreclosure of said mortgage, for the reason that the relator was not a party to the suit in which the receiver was appointed, save by virtue of its being an alleged stockholder in said alleged corporation, and in this action could not plead and protect its rights as owner of said property, or be heard in respect thereto; that it was entitled to the possession thereof pending the time for redemption, under the laws of this state, and could not be divested thereof save by judicial proceedings instituted for that purpose, and that a receiver could not be appointed without notice.

The court declined to vacate or modify the order appointing the receiver as requested, or in any manner whatsoever. The relator thereupon applied to this court and obtained therefrom an alternative writ of prohibition directed to said superior court and Hon. NORMAN BUCK, judge thereof, commanding it and him to desist and refrain from any further proceedings in the matter of the appointment of said receiver, so far as it relates to the property described in the writ, or so far as the same relates to this relator, until the further order of this court, and to show cause before this court, at a specified time; why they should not be absolutely prohibited and restrained from further proceeding in said matter. Upon the return day of the writ the respondent, the superior judge, appeared specially by counsel and moved the court to vacate the alternative writ heretofore issued and to dismiss this proceeding, on various grounds, the prin-

cial one of which is that this court is without jurisdiction herein.

It is earnestly contended on behalf of the respondent that, under the constitution and laws of this state; the superior court had exclusive jurisdiction of the action instituted therein by the prosecuting attorney, and was fully authorized to appoint a receiver therein, and that this court had no power or authority to interfere with, or control, the action of the superior court in respect thereto. That the superior court had jurisdiction of that action must be conceded, and if it had authority to make the order complained of, the respondent's contention must prevail, even though this court has jurisdiction generally to issue writs of prohibition, for this court would, under no circumstances, undertake to interfere with the lawful acts of a subordinate tribunal.

The first question for our determination is whether this court has jurisdiction of the matter now before it. In § 4 of art. 4 of the state constitution, it is provided that:

"The supreme court shall have original jurisdiction in *habeas corpus* and *quo warranto* and *mandamus* as to all state officers, and appellate jurisdiction in all actions and proceedings, excepting that its appellate jurisdiction shall not extend to civil actions at law for the recovery of money or personal property when the original amount in controversy or the value of the property does not exceed the sum of two hundred dollars (\$200), unless the action involves the legality of a tax, impost, assessment, toll, municipal fine, or the validity of a statute. The supreme court shall also have power to issue writs of *mandamus*, review, prohibition, *habeas corpus*, *certiorari*, and all other writs necessary and proper to the complete exercise of its appellate and revisory jurisdiction. . . ."

And in § 6 of the same article it is provided that:

“The superior court shall have original jurisdiction in all cases in equity, and in all cases at law which involve the title or possession of real property, or the legality of any tax, impost, assessment, toll or municipal fine, and in all other cases in which the demand or the value of the property in controversy amounts to \$100, and in all criminal cases amounting to felony, and in all cases of misdemeanor not otherwise provided for by law. . . . The superior court shall also have original jurisdiction in all cases and of all proceedings in which jurisdiction shall not have been by law vested exclusively in some other court. . . . Said courts and their judges shall have power to issue writs of *mandamus*, *quo warranto*, review, *certiorari*, prohibition and writs of *habeas corpus*, on petition by or on behalf of any person in actual custody in their respective counties. . . .”

It thus appears that the jurisdiction of the supreme court and of the superior courts of this state is expressly defined by the constitution, and reference must therefore be had to that instrument in order to determine the question of jurisdiction in any particular case; and it will be observed that by the terms of the constitution both this court and the superior courts are empowered to issue writs of prohibition.

But it is claimed on behalf of the respondent that the supreme court can issue such writs only when necessary to the exercise of its appellate jurisdiction. This contention of the respondent seems to be based upon the assumption that the very language of the constitution, “all other writs,” etc., clearly shows an intention to limit the power, granted to this court in the preceding portion of the sentence, to issue writs of prohibition, to cases where such writs are necessary to the exercise of its appellate power. If that be true, the power granted to this court in that regard is of little or no practical value, for it is difficult to conceive

a case in which it would be necessary to issue the writ solely for that purpose. Indeed, it has been held, and not without reason, that the granting a writ of prohibition is not the exercise of appellate jurisdiction, nor in aid of such jurisdiction. *Memphis v. Halsey*, 12 Heisk. 210; High, Extr. Legal Remedies, (2d ed.), § 785a.

But we do not think that the words referred to were intended to restrict or limit the power to issue the writs specifically mentioned, but rather to confer upon the supreme court the additional power to issue all other writs, whatever they may be, which may be necessary to the complete exercise of its appellate and revisory jurisdiction.

Under a provision of the constitution of California, relating to prohibition, which the framers of our constitution substantially copied, the supreme court of that state, so far as we have been able to ascertain, has always held that it had the power by prohibition to restrain the superior courts from proceeding in matters over which they have no jurisdiction, as well as to prevent them from proceeding in excess of their jurisdiction; and the decisions of that court construing this provision of the constitution are especially entitled to the favorable consideration of this court. In fact, it may, and probably should, be presumed that the construction placed upon the provision of the constitution now under consideration by that court was adopted by the framers of our own constitution. Black, Interpretation of Laws, p. 32.

Section 4 of art. 6 of the constitution of California, after defining the powers of the supreme court, proceeds as follows:

“The court shall also have power to issue writs of

mandamus, certiorari, prohibition and *habeas corpus*, and all other writs necessary or proper to the complete exercise of its appellate jurisdiction." Deering's Political Code, Title "Constitution."

Under that provision, and a statute relating to the office of prohibition similar to ours, the supreme court seems never to have hesitated to prohibit the superior courts from proceeding without, or in excess of, their jurisdiction. Among the numerous decisions of that court wherein this question is more or less discussed we need cite only the following: *Maurer v. Mitchell*, 53 Cal. 289; *Camron v. Kenfield*, 57 Cal. 550; *Farmers' Union v. Thresher*, 62 Cal. 407; *Hobart v. Tillson*, 66 Cal. 210 (5 Pac. 83); *Havemeyer v. Superior Court*, 84 Cal. 327 (18 Am. Rep. 192, 24 Pac. 121).

The last of the above cited cases is particularly instructive as to the question of the purpose and office of the writ of prohibition. Entertaining the same views as to the jurisdiction and power of this court with reference to the remedy of prohibition that are held by the supreme court of California, we have in numerous instances issued the writ where the object sought to be attained was the prevention of unauthorized acts on the part of the superior courts, and the practice of this court in that regard must now be deemed settled.

The objection to the jurisdiction of this court is not well taken. Nor do we think that the alternative writ fails to state facts entitling the relator to relief. Some other objections to the writ are made by the respondent, but as they do not relate to the jurisdiction of this court, but refer to matters which might be cured by amendment, we will not now stop to consider them in detail, but will proceed to the consideration of the

question whether the writ was properly issued in this instance.

The statute (Laws 1895, §§ 29 and 30, p. 119), provides:

“Sec. 29. The writ of prohibition is the counterpart of the writ of mandate. It arrests the proceedings of any tribunal, corporation, board or person, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board or person.

“Sec. 30. It may be issued by any court except police or justice's courts, to an inferior tribunal, or to a corporation, board or person, in all cases where there is not a plain, speedy and adequate remedy in the ordinary course of law. It is issued upon affidavit, on the application of the person beneficially interested.”

And the question then is, whether or not the superior court, in appointing a receiver in the *quo warranto* proceeding, proceeded “without or in excess of its jurisdiction.” If it did, it should be prohibited from taking any further action therein, and especially from enforcing the order complained of.

As justifying the action of the superior court, the respondent relies on subdivisions 3 and 5 of Sec. 326, of the Code of Procedure. But, in our opinion, those provisions are inapplicable here, for the reason that there is a special provision of the code with reference to the appointment of receivers in actions like that in which this receiver was appointed, by which the courts should be governed. We refer to § 689, which is as follows:

“If judgment be rendered against any corporation, or against any persons claiming to be a corporation, the court may cause the costs to be collected by executions against the persons claiming to be a corporation, or by attachment against the directors or other

officers of the corporation, and shall restrain the corporation, appoint a receiver of its property and effects, take an account and make a distribution thereof among the creditors. The prosecuting attorney shall immediately institute proceedings for that purpose."

And it would seem reasonably plain from this provision that the superior court had no right or power to appoint a receiver before trial and judgment in the action instituted on behalf of the state. The sole object of the action was to dissolve an alleged corporation, or at least, to exclude the defendants from corporate rights and franchises, and no judgment could be rendered therein except that prescribed by § 688 of the code. The state had no interest or right whatever in or to the property of the defendants, and the court had no authority, under the general provisions of the statute referred to by the respondent, or by virtue of any supposed equity power vested in it, to take property from the possession of the defendants, or either of them, and place it in the hands and under the control of a receiver. After such a judgment has been rendered against the defendants as is provided for by § 688, proceedings may be instituted by the prosecuting attorney by virtue of § 689, in which it may be proper to appoint a receiver to take an account and distribute the property of the alleged corporation among its creditors, if any it may have. But, pending the action in the superior court, the defendants, so far as the state is concerned, have the same right to possess and manage their property that they had before the institution of the suit against them by the prosecuting attorney. "Property rights cannot be confiscated by the state" in such an action as is now being waged in the superior court. 2 Morawetz, Private Corporations (2d ed.), § 1033.

Nor, on the same principle, can such rights be suspended or interfered with except by express authority of law, and therefore the point made by the respondent that the superior court at least had power to appoint a receiver temporarily cannot be sustained.

In addition to the motion or demurrer which we have above considered, the learned superior judge filed an answer in which he denies any knowledge or information sufficient to form a belief as to whether the relator is a foreign corporation, or as to whether it has complied with the laws of this state relating to foreign corporations, so as to be entitled to transact business in the state. He thus seeks to put in issue the corporate existence of the relator, and, having done so, claims, first, that until the question thus raised is determined, the relator has no standing in this court; and second, that this court cannot determine the question without prejudging a matter to be litigated in the action now pending in the superior court of Spokane county. Now, the only effect that issue could have on the present proceeding would be to postpone its further consideration until after the trial in the superior court. It can neither discharge the alternative writ heretofore issued, nor impair its force or effect upon the defendants, and the only object of the writ is to prevent the further action of the court in the matter of the appointment of a receiver, during the pendency of the action now before the court. The question, therefore, according to our view of the law applicable to this particular case, is not so essential to the determination of this application as to require this court, in its discretion, to refer it to a jury, or even to await the rendition of judgment in the superior court, before proceeding further. Laws 1895, § 21, p. 118.

The statute provides that the writ of prohibition is issued on the application of the person beneficially interested, and it seems plain to us that the relator, whether it is a *de jure* or only a *de facto* corporation, is sufficiently interested to be entitled to the possession of its property until deprived of it by a proper proceeding in a court of competent jurisdiction.

Some other minor questions of fact are sought to be raised by the answer, but what we have already said completely disposes of them.

As it appears to us that the relator is entitled to the benefit of the writ, and that it has no other plain, speedy and adequate remedy in the ordinary course of law, it follows that the peremptory writ should issue, and it is so ordered.

HOYT, C. J., and SCOTT, J., concur.

[No 2365. Decided November 30, 1896.]

JOHN L. KAHLEY, *Respondent*, v. JOHN HALEY, *Respondent*, EDWARD O. GRAVES, *Appellant*.

BAILEE — LIABILITY FOR CONVERSION — WHAT CONSTITUTES CONVERSION OF STOCK — EVIDENCE.

Where the bailor of a certificate of shares of stock agrees with a purchaser that a portion of the shares shall be transferred to him in consideration of a certain price, a portion of which is paid down, and the bailee in whose hand the certificate is held, consents thereto and agrees to hold the stock for the purchaser and to deliver the same to him, first procuring the cancellation of the original certificate and the issuance of another one to the purchaser upon his paying the balance of the purchase price, such transaction amounts to a sale, and passes such a title to the purchaser as to authorize an action on his part to recover for the conversion of the stock.

The surrender of a certificate of stock to one not entitled to it,

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who procures its cancellation and the issuance of a new certificate to himself, amounts to a conversion of the stock.

In an action to recover for the conversion of shares of stock by a bailee instituted by one who had purchased a portion of the shares, on account of the bailee's having surrendered all the shares to a third party assuming to be a purchaser of the whole of them, evidence tending to show that such third party paid the bailee in full for all the stock is immaterial.

Appeal from Superior Court, King County.—HON. RICHARD OSBORN, Judge. Affirmed.

Bausman, Kelleher & Emory, for appellant.

Stratton, Lewis & Gilman, and *Thomas A. Gamble*, for respondent.

The opinion of the court was delivered by

SCOTT, J.—This action was brought to recover the value of ten shares of stock in the Haley Grocery Company, which it was claimed the defendant Graves had wrongfully delivered to one Hill. Said stock had been deposited with Graves as bailee under the following agreement:

“SEATTLE, Washington, January 30, 1892.

E. O. GRAVES, Esq., Seattle, Wash.

Dear Sir: We deposit herewith the following papers.

1st. The two notes of Joseph B. Hill for \$2,515.35 each, one dated on or before one year after date; the other on or before two years after date.

2nd. Two notes of John Haley, exactly similar to the preceding.

3rd. Forty-five shares of the capital stock of the Haley Grocery Company, originally issued to James H. Glenn, and by him endorsed to Joseph B. Hill.

4th. Forty-five similar shares endorsed by J. H. Glenn to John Haley.

The papers are left with you with the following mu-

tual agreement and understanding: Messrs. Hill and Haley have purchased each the shares mentioned respectively, and have paid J. H. Glenn, by their respective notes. The shares are not to be delivered up to the purchasers until the notes are paid, nor are the notes to be removed or negotiated by the payee during the period which they run. • On the payment of these notes, which can be done at any time before or after maturity, you will please deliver to the purchasers, respectively, their shares, and each of the purchasers shall have a right to a separate release on the payment of his individual notes.

(Signed)

J. H. GLENN,
JOSEPH B. HILL,
JOHN HALEY.

Witness:

FRED BAUSMAN.

I assent to hold the aforesaid papers on the above terms. (Signed) E. O. GRAVES."

The shares in question were included in the certificate for the forty-five shares indorsed by Glenn to Haley. Haley negotiated a sale of the ten shares to the plaintiff Kahaley, and on February 2, 1892, Haley, Graves and Kahaley met at Graves' office, Graves being present, and stated the terms of the sale to him, whereupon Kahaley paid to Graves \$1,000, which was indorsed upon the notes given by Haley to Glenn, which were held by Graves, and for which the stock was pledged as security. The amount paid did not represent the whole purchase price. The plaintiff contends that the balance remaining unpaid was only the sum of thirty dollars, while Graves contends that it was something more than that, but as the jury found for the plaintiff, it must be considered that this question of fact was determined in the plaintiff's favor.

It is conceded that the balance was not to be paid

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until the certificate for the forty-five shares had been surrendered, and two new certificates taken, one for the ten shares to Kahaley, whereupon it was to be turned over to Kahaley upon his paying the balance of the price remaining unpaid.

It is conceded that nothing further was done by any of the parties until late in the month of October, when Haley gave Hill an order upon Graves in the following language:

“You are hereby authorized to deliver to Joseph B. Hill all shares of stock of Haley Grocery Company in my name and deposited with you as collateral for the payment of my note or notes to J. H. Glenn, upon the payment by said Hill of whatever may be due said Glenn upon said notes, or when for any other reason said stock may be released as collateral.

JOHN HALEY.”

Graves accepted this order in writing, but did not then deliver to Hill the certificate of the shares. On November 15th Kahaley tendered to Graves the balance of thirty dollars and demanded the ten shares of stock sold him as aforesaid, which Graves refused to deliver to him, and thereafter delivered to Hill. Hill caused the certificate to be canceled and a new one issued to him for the whole forty-five shares, whereupon the plaintiff brought this action and obtained a judgment in his favor against Graves, and Graves has appealed.

It is conceded that Graves was only a gratuitous bailee, and it is not claimed that there was any fraud upon his part in said matter, but only that he delivered the certificate aforesaid to Hill under a mistaken idea of his duty.

The first errors alleged are based upon the refusal of the court to grant a non-suit, and to peremptorily instruct the jury to find a verdict in favor of appellant

on the ground of insufficiency of the evidence. It is based upon two propositions. One was that the plaintiff had no such ownership in the shares of stock in question as would entitle him to maintain the action, and the second was that there had been no conversion of the stock. We are of the opinion that the facts testified to show a sale of the stock from Haley to Kahaley, that Graves consented thereto, agreed to hold the stock for Kahaley thereafter, and to deliver the same to him, first procuring the cancellation of the original certificate and the issuance of another one for the ten shares to Kahaley upon his paying the balance of the purchase price. *Beardsley v. Beardsley*, 138 U. S. 262 (11 Sup. Ct. 318).

Graves' contention is that he was bound to deliver the stock to Hill by the acceptance of the written order prior to the tender of the balance by Kahaley, and that at the time he accepted said order he had forgotten about the agreement relating to the sale of the ten shares to Kahaley. Kahaley, as well as Graves, seems to have been somewhat negligent in the matter in allowing it to run for so long a time after the agreement aforesaid was entered into, and had Graves delivered the certificate for the shares to Hill prior to the tender of the balance due to him by Kahaley there might be ground for holding that Kahaley was not entitled to recover of Graves for the shares purchased by him. But it will be observed that the order given subsequently by Haley to Hill, which Graves accepted, did not mention any particular number of shares, but directed him to deliver all shares of stock of the Haley Grocery Company in Haley's name, then deposited with Graves as collateral as aforesaid. At the time this order was given it does not appear that Haley knew that Graves still held the ten shares which

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had been negotiated to Kahaley, if that were material. We think the fair purport of that order authorized the delivery of only thirty-five of the shares indorsed by Glenn to Haley, and that Graves' acceptance of that order bound him to deliver only that number of shares.

There is some contention that, at the time Hill presented this order and Graves accepted it, Hill paid to Graves the value of the whole forty-five shares, but be this as it may, if such payment was made upon a misunderstanding of the amount of shares then held by Graves for Haley, steps could have been taken, if necessary, to have the excess returned to Hill by Graves when he was reminded of the true state of affairs, and he received such notice at the time of the tender to him by Kahaley of the balance of the purchase price remaining unpaid, and he had the stock in his possession at that time. In any event, Kahaley was not concerned with the amount paid by Hill to Haley, or to Graves for him, for the stock.

The surrender of the certificate for the stock by Graves to Hill and the cancellation of it and the issuance of a new certificate to Hill, amounted, under the authorities, to a conversion of the stock, and there was no error in the matters stated. 1 Cook, Stock and Stockholders, § 576.

It is next contended that the court erred in allowing Haley and Kahaley to testify to their understanding as to whether the transactions had between them and Glenn in the presence of Graves as aforesaid, amounted to a sale of the stock, but we fail to see anything material in this. Both parties had testified directly that the stock was sold, and their further testimony, that they intended the one to sell it and the other to purchase it, could add nothing to this.

It is next contended that the court erred in sustaining an objection to a question by appellant to Hill asking him how he paid for the stock in question. We think that this was immaterial.

The next errors complained of are in relation to the instructions, which were requested by the appellant and which the court refused to give, but these were all based upon the appellant's contention of the insufficiency of the evidence to support a sale of the stock by Haley to Kahaley, and a conversion of it thereafter, and have been disposed of in what has previously been said.

The case seems to have been properly submitted to the jury, and the verdict and judgment in favor of the plaintiff is affirmed.

DUNBAR, ANDERS and GORDON, JJ., concur.

HOYT, C. J., dissents.

[No 2392. Decided November 30, 1896.]

MARGARET E. F. A. GOODFELLOW, *Respondent*, v. W.
H. LEMAY *et al.*, *Appellants*.

GIFT BY HUSBAND TO WIFE OF COMMUNITY LAND — LIABILITY FOR COMMUNITY DEBTS.

Where land has been conveyed by a husband to his wife by a deed reciting that the land is "to be held to her separate use," such land, when the transfer has not been made in fraud of creditors, becomes the separate property of the wife, and is not liable for community debts, which have not been contracted for expenses of the family or for the education of the children.

The fact that the wife was not present at the time of the execution of a deed of lands to her by her husband and was not consulted in regard thereto, would not affect its character as vesting a separate title in her, where she has accepted the deed, and it has not been made in fraud of existing creditors.

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Opinion of the Court—SCOTT, J.

The recital in a deed by a husband to his wife that the lands conveyed were "to be held to her separate use," thus in effect *constituting* a gift to her, cannot be affected by the parol testimony of the husband that his purpose was to make provision for her and the family against possible reverses.

Appeal from Superior Court, King County.—Hon. J. W. LANGLEY, Judge. Affirmed.

J. T. Ronald, for appellants.

Strudwick & Peters, for respondent.

The opinion of the court was delivered by

SCOTT, J.—The appellants recovered a judgment against one Baxter and one Goodfellow, who was the husband of the respondent. An execution was issued upon the judgment and levied upon certain lands as the community property of respondent and her husband, and this action was brought to restrain the sale of said lands on the ground of their being the separate property of the respondent. The judgment having been rendered in her favor, this appeal was taken.

There seems to be no contention over the facts in the case. It appears that the lands had been purchased by the respondent's husband of one Leary, and a deed taken in the husband's name, and that in January, 1885, for the purpose of making a gift of said lands to his wife, the husband re-deeded the same to Leary and Leary deeded them to the respondent, the deed reciting that the lands were "to be held to her separate use."

It is contended that the husband's testimony, as to his purpose in causing the lands in question to be conveyed to his wife, to the effect that he desired to make provision for her and the family against possible reverses, shows that the same was not intended as a gift

to her; but this, if material, could not control as against the expressed intention of the deed. Nor would the fact that the wife was not present when the deed was executed and was not consulted with regard to the transaction affect it; for the deed was made and accepted by her several years before the debt to the appellants was contracted. Consequently they could not be heard to question it. But, aside from this, there was no proof of any fraudulent purpose or intention upon the part of the husband or his wife as against any one. We think the law, as applied to the conceded facts, clearly shows that the respondent was entitled to the relief given her.

The appellants have asked us to re-examine the question as to the liability of the separate property of the wife for community debts. We have done so to the extent of considering the argument advanced thereon by the appellants, and are satisfied with the position heretofore taken by us. It is not contended that the debt was contracted for expenses of the family or for the education of the children, so as to be chargeable to her separate property under §1414 of the General Statutes.

Affirmed.

HOYT, C. J., and DUNBAR, ANDERS and GORDON, JJ.,
concur.

Nov. 1896.] Opinion of the Court — HORT, C. J.

[No. 2394. Decided November 30, 1896.]

BESSIE HENDRICKS *et al.*, *Appellants*, v. J. K. EDMISTON,
et al., *Respondents*.

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120	691

NOTICE OF APPEAL — SUFFICIENCY OF SERVICE — DEED — DELIVERY IN
ESCROW — WAIVER OF CONDITIONS — ESTOPPEL.

A notice of appeal, which is directed to all the parties appearing in the action, and duly served upon the attorneys appearing for them, is sufficient, although but one attorney may appear for several parties, and such attorney be served with but one copy of the notice.

A finding that the conditions upon which a deed had been placed in escrow has been complied with is warranted, when it appears that the condition was solely for the benefit of the grantee and could be waived by him, and that he had waived such condition by taking the deed and placing it of record.

Where one holding the legal title to land participates in a conveyance thereof made by her grantor to a subsequent grantee, she is estopped from setting up her title as against such subsequent grantee, although he knew the property had been transferred to her, when it appears that she had no beneficial interest in the property, as it had been conveyed to her merely for the purpose of putting it out of the reach of creditors of her grantor.

Appeal from Superior Court, King County.—Hon.
J. W. LANGLEY, Judge. Affirmed.

C. W. Corliss, C. S. Preston, and Fred H. Peterson,
for appellants.

Hastings & Stedman, Burke, Shepard & McGilvra,
and *Strudwick & Peters* (*Herbert W. Huntley*, of counsel),
for respondents.

The opinion of the court was delivered by

HORT, C. J.—Respondents have moved to dismiss. Their motion is founded upon the alleged fact that all of the parties who appeared in the action were not served with notice of appeal. It appears, however,

that the parties, who it is claimed were not served, appeared in the action by the same attorneys as other parties, and that notice of appeal, directed to all of the parties who appeared, was duly served upon such attorneys. This was sufficient.

Motion denied.

Prior to 1890, Seymour Wetmore was the owner of the property described in plaintiff's complaint. Thereafter he executed a bond, in which he bound himself to convey said property to J. K. Edmiston, upon the performance by him of the conditions set out in the bond. To foreclose the rights of said Edmiston and those holding under him under this bond, this action was brought by the plaintiffs, who claimed to have acquired the legal title to the property by a warranty deed from said Seymour Wetmore to plaintiff Bessie Hendricks. Upon the answers of the defendants and the reply thereto by the plaintiffs, material issues were raised as to the effect of the deed from Seymour Wetmore to Bessie Hendricks, and as to whether or not the conditions of the bond for a deed had been complied with by said Edmiston and the property deeded to him by the said Wetmore. Other questions incidental to these were also raised, but the findings of the trial court in reference thereto were so fully supported by the testimony that it is not necessary to say more than that such findings must be taken as true for the purpose of determining the rights of the parties.

As to these two main questions of fact the trial court found that the deed from Wetmore to Bessie Hendricks, under which plaintiffs claim, was executed without consideration and for an illegal purpose. It also found that Edmiston had complied with the conditions

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Opinion of the Court—Horr, C. J.

of the bond and that, upon such compliance, Wetmore had made such a conveyance as to vest in him the full legal title to the property. Upon the latter question the undisputed proof showed that there had been an arrangement entered into between Wetmore and Edmiston in which it was agreed that Edmiston should make certain promissory notes to Wetmore; that said notes should be accepted in full payment of the amount then due upon the bond; that by reason of such payment Wetmore was to comply with the requirements of the bond and convey the legal title to the property to Edmiston. There was also evidence tending to show that this arrangement had been fully carried out by the delivery of the notes to Wetmore and of the necessary conveyance to Edmiston. This evidence was contradicted by that introduced on the part of the plaintiffs, which tended to show that the arrangement was not completed; that the notes and deed were placed in escrow and had never been delivered. Three witnesses offered by the plaintiffs testified to facts which tended to show that the papers were at the time of their execution placed in escrow so as not to take effect until certain conditions had been complied with; but their testimony did not agree as to the conditions upon which the instruments were to become operative. One of them testified to facts tending to show that they were not to be effective until some arrangement had been made as to the title of the plaintiff Bessie Hendricks. The others testified to facts tending to show that they were to be effective when the title conveyed by the deed to Edmiston had been approved by his attorney. And the court was justified in finding the latter condition to have been the one agreed upon, and, if it was, the condition was solely for the benefit of Edmiston and

could be waived by him, and was waived when he took the deed and placed it upon record. Taking all the evidence into consideration, the trial court rightfully found that the transaction in question was fully completed, and that the title which Wetmore had in the property at the date of the transaction thereby became vested in Edmiston.

This brings us to a consideration of the claim of title of the plaintiffs under the deed from Wetmore to plaintiff Bessie Hendricks. It is conceded that this deed was executed and placed on record before the date of the transaction which resulted in the deed from Wetmore to Edmiston. If it conveyed title which the plaintiffs were in a situation to assert against that conveyed by the deed to Edmiston, Wetmore, at the date of the latter deed, had nothing to convey, and the plaintiffs at the date of the commencement of the action were the owners of the property. The deed to plaintiff Bessie Hendricks covered other property than that the title to which is involved in this action, and the testimony tended to show that the deed was first made out for the purpose of conveying only such other property, and that after it had been so made out it was changed to cover the property in question for the purpose of placing the apparent title thereto in the plaintiff Bessie Hendricks, so that it would not be affected by certain proceedings against Wetmore, and not for the purpose of vesting the title in the grantee for her own benefit. The testimony upon this question was not as full as it might have been, but when the circumstances are taken into consideration, that of the plaintiff Bessie Hendricks alone was sufficient to warrant the court in finding as it did upon this question. Her testimony as to the transactions immediately connected with the execution of the deed, taken in

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connection with what was proven as to her conduct at the time of the alleged settlement of the bond matter between Wetmore and Edmiston, sufficiently showed that she took title to the property in question not for her own benefit but to preserve it for Wetmore. The practically undisputed testimony as to the transactions connected with such settlement was that the plaintiff J. K. Hendricks, who was the husband of the plaintiff Bessie Hendricks, was fully authorized to act for her in everything connected with the transaction; that he fully understood the terms and conditions of this settlement; that he was consulted with about it and actively participated therein; that he accepted a portion of the proceeds of such settlement. Such testimony established beyond question the fact that the plaintiff J. K. Hendricks had such connection with all the transactions, which resulted in the conveyance of the title by Wetmore to Edmiston, that he could not be heard to question the title thus conveyed. And his wife for whom he was acting was also bound by what was then done.

But it is not necessary, to conclude her, to hold that she was bound by the action of her husband, for the reason that there was testimony which directly connected her with the transaction. The largest of the notes which were given by Edmiston to Wetmore was, by said Wetmore, endorsed to her and by her own hand endorsed in blank. It also appeared that this note was deposited in bank as the property of J. K. Hendricks and Bessie Hendricks, and that certain payments thereon were made to J. K. Hendricks. These facts, when taken in connection with the other circumstances proven, were sufficient to show that Bessie Hendricks, as well as J. K. Hendricks, was an active party to the transaction which culminated in

the conveyance of the title by Wetmore to Edmiston.

But it is contended on the part of the appellants that, even if she was, she is not thereby prevented from asserting title to the property, for the reason that Edmiston at the time of the transaction knew that the property had been conveyed by Wetmore to her. If she had had any real interest in the title conveyed to her by Wetmore, it might be true that she would not be estopped from asserting it by reason of her consent to the conveyance to Edmiston; but, in view of the fact that she had no beneficial title, it is but fair to presume that all of the parties acted upon the fact, which was then known to them, that Wetmore was the real owner of the property; and, if they did so act, none of them are now in a position to deny that a conveyance by him passed a good title.

A careful examination of the entire record satisfies us that the findings of fact by the trial court were justified by the evidence and that such findings justified the legal conclusions founded thereon.

The decree will be affirmed.

SCOTT and ANDERS, JJ., concur.

GORDON, J., not sitting.

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Argument of Counsel.

[No. 2409. Decided November 30, 1896.]

J. W. DUTCHER, *Appellant*, v. H. C. HOWARD, *Respondent*.

WITNESS — RE-EXAMINATION — MAY COVER GROUND OF CROSS-EXAMINATION — NON-SUIT — SUFFICIENCY OF EVIDENCE.

Where counsel examine a witness as to facts not admissible in evidence the other party is entitled to re-examine as to the testimony elicited.

A non-suit is improper, when there is sufficient testimony to sustain a verdict, although the facts testified to may be inadmissible in evidence and are only properly in the case as a result of the unchallenged examination of witnesses.

Appeal from Superior Court, Skagit County.—
Hon. HENRY MCBRIDE, Judge. Reversed.

Million & Houser, for appellant:

"If the counsel chooses to cross-examine the witness to facts, which were not admissible in evidence, the other party has a right to re-examine him as to the evidence so given." 1 Greenleaf, Evidence, (13th ed.) § 468; 1 Rice, Evidence, p. 610; *King v. Haney*, 46 Cal. 563 (13 Am. Rep. 217); *Hogan v. Shuart*, 28 Pac. 969; *Sullivan v. City of Oskosh*, 13 N. W. 469; *Chicago, etc., Ry. Co. v. Wiebe*, 41 N. W. 297; *Wheelock v. Godfrey*, 35 Pac. 319; *Bruce v. State*, 21 S. W. 681; *Toliver v. State*, 10 South. 428; *Byrne v. Reed*, 17 Pac. 202; *Fauloon v. Johnston*, 9 S. E. 394; *Wiggins v. Guthrie*, 101 N. C. 661; *Dallmeyer v. Dallmeyer*, 16 Atl. 72; *Cropsey v. Averill*, 8 Neb. 151.

Where counsel allows testimony to go in without objection, with a full knowledge of its character at the time it is offered, they cannot at the close move to strike out, even if their motion would otherwise have

been well taken. *Wendt v. Chicago, etc., Ry. Co.*, 57 N. W. 227; *People v. Nelson*, 24 Pac. 1006; *Hickman v. Green*, 27 S. W. 440; *Bingham v. Walk*, 27 N. E. 485; *Brown v. Owen*, 94 Ind. 31; *Brown v. Cleveland*, 62 N. W. 463; *Ellinger v. Rawlings*, 40 N. E. 146; *Lake Shore, etc., Ry. Co. v. McIntosh*, 38 N. E. 476; *Mabry v. State*, 14 South. 267; *Taylor v. McGrath*, 36 N. E. 164; *Way v. Johnson*, 58 N. W. 553; *Western Home Ins. Co. v. Richardson*, 58 N. W. 600.

Sinclair & Smith, and *George A. Joiner*, for respondent :

No questions can properly be put to a witness on re-examination, which do not relate to matters inquired into on cross-examination, even the fact that a witness on his cross-examination has related a part of a hearsay story will not authorize the party calling him to call out the rest of it, if a proper objection is interposed. *Miller v. Illinois Central R. R. Co.*, 57 N. W. 418; *Fry v. Leslie*, 12 S. E. 671; *Schaser v. State*, 36 Wis. 429; *Bassham v. State*, 38 Tex. 622; *Wagner v. People*, 30 Mich. 384; *Uhe v. Chicago, etc., Ry. Co.*, 54 N. W. 601; *Fremont Butter & Egg Co. v. Peters*, 63 N. W. 791; *Redman v. Peirsol*, 39 Mo. App. 173; *Roberts v. Boston*. 21 N. E. 668; *Avery v. Mattice*, 9 N. Y. Supp. 166.

The opinion of the court was delivered by

DUNBAR, J.—This is an action brought by appellant against respondent for damages in the sum of \$10,000 alleged to have been sustained by appellant by reason of certain wrongful acts of respondent in alienating the affections of appellant's wife, thereby causing appellant to be deprived of the comforting society of said wife and causing his domestic relations to be broken up and destroyed, etc.

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The answer was a denial of the acts and the cause proceeded to trial before a jury. At the close of plaintiff's testimony defendant moved for a non-suit on the ground of a total failure of proof, which motion was granted by the court.

During the trial one Mrs. M. J. Larson testified on behalf of the plaintiff, and in her examination in chief she testified over respondent's objection to certain acts and transactions which had taken place between respondent and appellant's wife. This testimony was based upon what appellant's wife had told witness with reference to these matters. At the close of the examination in chief of this witness, counsel for the respondent moved to strike out all the testimony as to what was told witness by Mrs. Dutcher, the appellant's wife, which motion was granted by the court. Thereupon, on cross-examination, counsel for the respondent proceeded to examine witness with reference to the same matters which had been eliminated from the case by the ruling of the court on respondent's motion. On the re-direct examination the counsel for the appellant again went into the testimony called out by the respondent, carrying on the same line of inquiry on re-cross-examination that had been carried on by the cross-examination of the respondent. At the close of this witness's testimony respondent's counsel moved that all the testimony concerning the confession made to the witness, Mrs. Larson, as testified to by her, be stricken from the record. This motion was granted by the court and the granting of said motion is assigned as error here. We are satisfied from the testimony in this case that, if the testimony of Mrs. Larson were allowed to stand, there was sufficient testimony to have been submitted to the

jury, and the court would not have been warranted in granting a motion for non-suit.

It is contended by the respondent that the error alleged by the appellant is not based upon the facts in the case, that the record shows that the witness was not examined as to what Mrs. Dutcher said to the witness, and that no part of the cross-examination was directed towards ascertaining what Mrs. Dutcher said or confessed, whether wholly or in part; but we have examined the testimony thoroughly and are convinced that the record bears out the statement made by the appellant. The counsel chose to examine the witness as to facts which were not admissible in evidence, and under all the authorities, and for the best of reasons, we think the other party had a right to re-examine as to the evidence elicited by the cross-examination.

For this error in striking out testimony which, if admitted, would have been sufficient to have sustained a verdict, the judgment will be reversed with instructions to overrule the motion for non-suit.

ANDERS and GORDON, JJ., concur.

HOYT, C. J., dissents.

[No. 2286. Decided July 9, 1896.]

JOHN F. WARNER, *Plaintiff*, v. D. A. COWIE *et al.*, *Defendants*, KEEFE & PERKINS, *Garnishee Defendants*.

Original Application for Certiorari.

John W. Whithan, for petitioner.

Per Curiam.—This is an application for a writ of certiorari where the original amount in controversy is less than \$200. In the case of *State, ex rel. Hamilton, v. Superior Court of Jefferson County*, 8 Wash. 271 (36 Pac. 27), we held that we had no jurisdiction to review the

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action of the superior court by means of certiorari proceedings when the original amount in controversy in the case did not exceed the sum of \$200, and the action did not involve the legality of a tax, impost, assessment, toll, municipal fine, or the validity of a statute, and that to allow the relator to obtain a reversal of the judgment through the medium of certiorari, which he could not obtain by appeal, would be to render nugatory the provision of the constitution above quoted. This case falls exactly within the rule announced in the case above cited, and for that reason the writ will be denied.

[No. 2384. Decided September 25, 1896.]

THOMAS KELLEY, *Respondent*, v. PIERCE COUNTY *et al.*, *Appellants*.

Appeal from Superior Court, Pierce County,—Hon. JOHN C. STALLCUP, Judge. Reversed.

Coiner & Shackleford, and *Crowley, Sullivan & Grosscup*, for appellants.

Wickersham & Reid, for respondent.

Per Curiam.—The judgment in this case is directly in conflict with the decision of this court in *State, ex rel. Barton v. Hopkins*, 14 Wash. 59 (44 Pac. 134), and *Mullen v. Sackett*, 14 Wash. 100 (44 Pac. 136). The judgment will therefore be reversed and the cause remanded to the lower court with instructions to sustain defendants' demurrer to the complaint.

[No. 2292. Decided September 25, 1896.]

E. M. RANDS, *Appellant*, v. THE COUNTY OF CLARKE *et al.*, *Respondents*.

Appeal from Superior Court, Clarke County.—Hon. A. L. MILLER, Judge. Affirmed.

W. W. McCredie, for appellant.

Moody, Coovert & Stapleton, for respondents.

Per Curiam.—This case falls substantially within the rule announced by this court in *State, ex rel. Barton, v. Hopkins*, 14 Wash.

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15b	697
19	449
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59 (44 Pac. 134), and the further opinion filed in that case March 31, 1896, and reported on page 550, Vol. 44, Pac. Rep. (14 Wash. 66). Hence, in accordance with the rule there announced, the judgment will be affirmed.

[No. 1827. Decided September 28, 1896.]

THE STATE OF WASHINGTON, *Respondent*, v. GEORGE SMITH, *Appellant*.

Appeal from Superior Court, Spokane County.

Houghton & Ridpath, J. L. Crotty, and S. A. Johnston, for appellant.

James E. Fenton, for The State.

Per Curiam.—This case involves the same question that was decided by this court in *State v. Halbert*. 14 Wash. 306 (44 Pac. 538). Upon the authority of that case the judgment herein is reversed and the cause remanded with directions to the lower court to sustain the demurrer to the information.

[No. 2194. Decided September 30, 1896.]

WALTER LOVEDAY, as *Receiver*, *Appellant*, v. P. D. NORTON *et al.*, *Respondents*.

Appeal from Superior Court, Pierce County.—Hon. W. H. PRITCHARD, Judge. Affirmed.

John D. Fletcher (Fred A. Brown and W. A. Peters, of counsel), for appellant.

Herbert S. Griggs, for respondents.

Per Curiam.—It is not claimed that the findings of fact made by the superior court do not justify its conclusions of law founded thereon; but it is earnestly contended that some of the findings of fact are not supported by the evidence. A careful examination of the voluminous record has failed to satisfy us that such was the case. On the contrary we think that every material finding of fact was not only sustained by competent testimony, but was in accordance with a fair preponderance of all the evidence offered. The reasons

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which have led us to this conclusion could not be satisfactorily given without a recital of much of the voluminous evidence introduced upon the trial, and this could not properly be done in this opinion. Hence we shall content ourselves with saying that the questions of fact presented, upon which a reversal of the judgment is sought, have been determined by us adversely to the contention of the appellant.

The judgment will be affirmed.

[No. 2326. Decided October 8, 1896.]

THE STATE OF WASHINGTON ON THE RELATION OF THOMAS B. MULLEN,
Respondent, v. THOMAS E. DOHERTY, *Appellant*.

Appeal from Superior Court, Pierce County.—Hon. W. H. PRITCHARD, Judge. Affirmed.

Governor Teats, J. P. Judson, and W. H. H. Kean, for appellant.

Claypool, Cushman & Cushman, for respondent.

Per Curiam.—For reasons announced in the opinions recently filed by this court in the cases of *Fawcett v. Superior Court of Pierce County*, ante p. 342 and *State, ex rel. Mullen v. Superior Court of Pierce County*, ante, p. 376, the writ applied for will be denied.

[No. 2302. Decided November 9, 1896.]

D. BUCHANAN, *Respondent*, v. ADAMS COUNTY, *Appellant*.

Appeal from Superior Court, Adams County.—Hon. WALLACE MOUNT, Judge. Reversed.

O. R. Holcomb, and James A. Haight, for appellant.

D. Buchanan, for respondent.

Per Curiam.—Under the rule announced by this court in *Olympia Water Works v. Board of Equalization of Thurston County*, 14 Wash. 268 (44 Pac. 267), an appeal did not lie from the order made by the board of equalization to the superior court. Such court was therefore without jurisdiction to make the order from which this appeal has been prosecuted. It will be reversed and the proceeding dismissed.

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[No. 2287. Decided November 16, 1896.]

STANTON WARBURTON, *Respondent* v. E. G. BACON *et al.*, *Appellants*.

Appeal from Superior Court, Pierce County.—Hon. W. H. PRITCHARD, Judge. Affirmed.

Coiner & Shackleford, and *Joseph C. Dillow*, (*L. P. Shackleford*, of counsel), for appellant.

Stanton Warburton, for respondent.

Per Curiam.—The errors complained of in this case relate in substance to the facts found by the lower court. After a consideration of the proofs and the able argument of appellants' counsel, we are not satisfied that such findings should be materially set aside or modified, however we might have found thereon as an original proposition. A discussion of the proofs would serve no purpose in the published reports and the judgment is affirmed.

[No 2372. Decided November 21, 1896.]

STARR & COMPANY, *Appellant*, v. J. E. CHILBERG *et al.*, *Respondents*.

Appeal from Superior Court, King County.—Hon. RICHARD OSBORN, Judge. Affirmed.

Metcalf & Jurey, for appellant.

John E. Humphries, *E. P. Edsen*, and *Stratton, Lewis & Gilman*, for respondents.

Per Curiam.—An investigation of the pleadings and of the testimony in this case convinces us that no testimony was offered by the plaintiff which would have been sufficient, if uncontradicted, to have sustained the verdict. The motion for a non-suit was, therefore, properly sustained, and the judgment will be affirmed.

[No. 2393. Decided November 27, 1896.]

E. D. BACON *et al.*, *Appellants*, v. CITY OF SEATTLE, *Respondent*.

Appeal from Superior Court, King County.

Stratton, Lewis & Gilman, for appellants.

John K. Brown, and *Battle & Shipley*, for respondent.

Per Curiam.—The appellants, in the elaborate brief filed in this cause, have attempted to distinguish it from the cases of *Frederick v. Seattle*, 13 Wash. 428 (43 Pac. 364), and *Cline v. Seattle*, 13 Wash. 444 (43 Pac. 367); but a careful examination of every question discussed has failed to satisfy us that this case does not fall fairly within the principles therein announced, and upon the authority of those cases the judgment must be affirmed.

[No 2347. Decided November 30, 1896.]

THE STATE OF WASHINGTON ON THE RELATION OF AMSTERDAMSCH TRUSTEES KANTOOR, v. SUPERIOR COURT OF SPOKANE COUNTY AND NORMAN BUCK, *Judge thereof*.

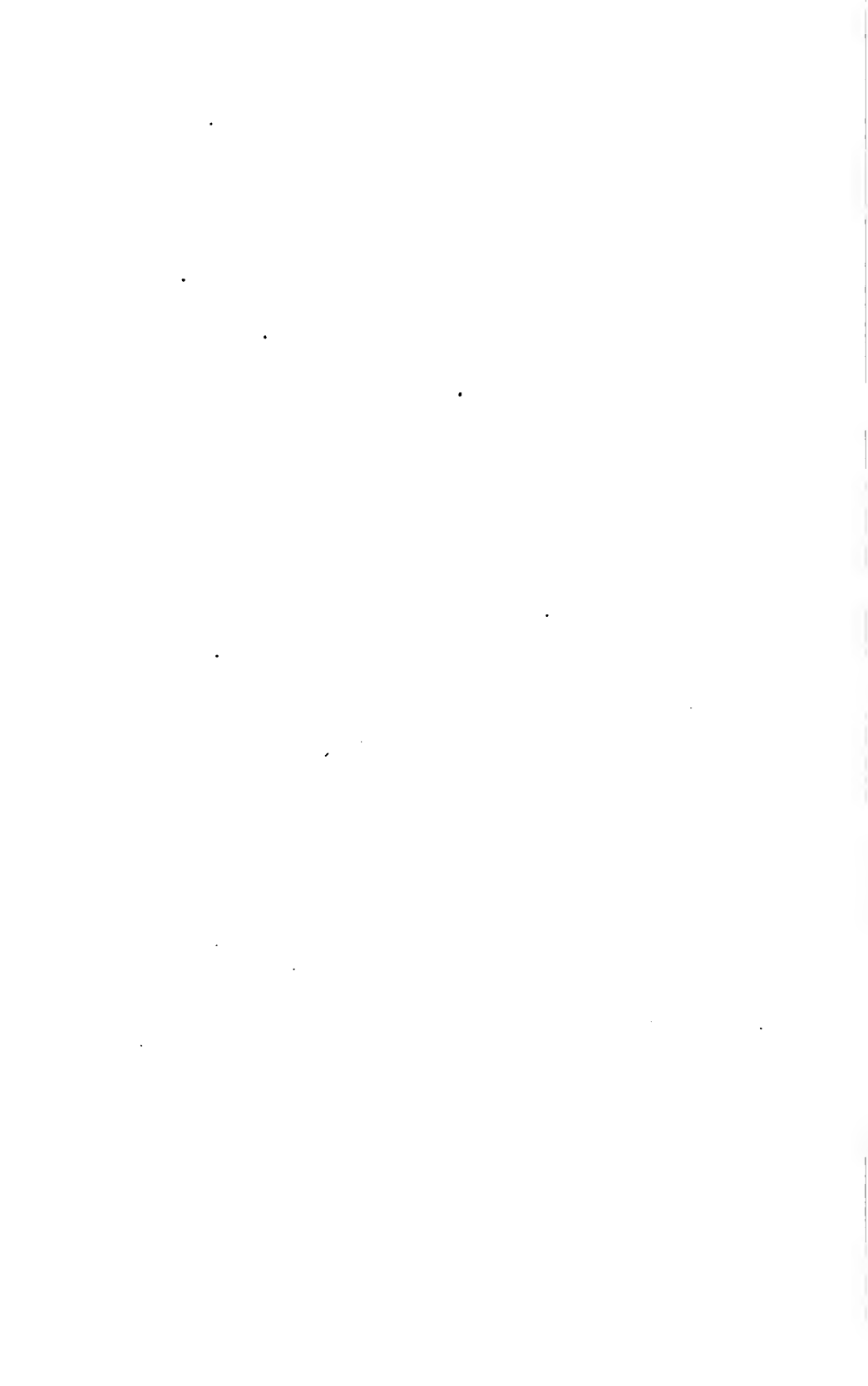
Original Application for Prohibition.

Binkley, Taylor & McLaren, and *Graves, Wolf & Graves*, for relator.

Cyrus Happy, for respondents.

ANDERS, J.—This case presents substantially the same questions that were involved and determined in the case of *State, ex rel. Amsterdamsch Trustees Kantoer v. Superior Court*, ante, p. 668, and for the reasons given in the opinion therein, the peremptory writ of prohibition must be granted.

HOYT, C. J., and SCOTT, J., concur.



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2. *Same—When Question of Law.* When the facts in regard to the statement of an account are agreed upon, the question of what is a reasonable time within which the account will be presumed to become stated, is one of law; and, when the facts are not agreed upon, it is a mixed question of law and fact. —*Id.*..... 627

ACCOUNT STATED—CONTINUED.

3. *Same — Presumptions.* The presumption that an account had been consented to so as to become a stated account is not warranted by proof showing that an attorney had presented his bill for services to a client in another city, and that, some twenty days after the receipt of the letter, the latter had written asking for information in order to determine as to the justness of the account, which the attorney failed to give; and the fact that the client had not denied the bill rendered would not show an agreement thereto, so long as the demand for information had not been complied with.—*Id.*..... 627

ADULTERATION OF FOOD. See CRIMINAL LAW, 13.

APPEAL.

1. *Judgment Below Upon Remand—Compliance with Mandate.* Where the appellate court has held that the appellant holds certain real estate in his own name in trust for a partnership of which he was a member, and that upon payment to him of moneys advanced for its purchase, for which he was entitled to a lien thereon, the remaining property or its proceeds should be divided among the partners according to their proportionate interests, the trial court on a remand of the case has no authority to enter an order that the respondent would be entitled to a deed conveying to him a certain proportion of the trust property on his payment to appellant of respondent's proportion of the indebtedness. *Soules v. McLean*..... 22
2. *Time for Appeal—Reduction by Statute—When Operative Upon Pending Appeals.* An appeal taken within six months after judgment, pursuant to the appeal act of 1893, is in time, although prior to the taking of the appeal the act of 1895 was passed reducing the time in which an appeal might be taken to ninety days, the latter act, however, not becoming effective until after said appeal had been taken.—*Brookman v. State Ins. Co.*..... 29
3. *Service of Statement of Facts.* Service upon respondent of a copy of a statement of facts prior to the filing of the original in the clerk's office, is ineffectual for purposes of appeal. *Barkley v. Barton*..... 33
4. *Time of Appeal—Estoppel.* Where an appeal has been taken from a judgment, the appellant is estopped to afterwards take advantage of the fact that no copy of the judgment had been served upon him.—*Id.*..... 33

APPEAL—CONTINUED.

5. *Want of Special Findings—When Not Error.* Failure of the court to make special findings cannot be urged on appeal, where no requests therefor appear in the record.—*Davis v. Ford* 107
6. *Exceptions to Findings—When Taken.* Where exceptions to findings of fact and conclusions of law are not taken within five days after their filing, as required by Laws 1893, p. 112, § 3, they are insufficient to secure a review in the appellate court of the evidence upon which they are based.—*National Bank of Commerce v. Seattle Pickle and Vinegar Works* 126
7. *Same—Power of Court to Extend Time.* The act of March 15, 1893 (Laws 1893, p. 415, § 24), providing that "the court may enlarge or extend the time, for good cause had or taken, notice of paper filed or served, or may . . . permit the same to be done or supplied after the time therefor has expired," does not relate to nor govern proceedings subsequent to the entry of judgment, as the title of the act indicates that it is merely "An act to provide for the manner of commencing civil actions in the superior courts, and bringing the same to trial."—*Id.* 129
8. *Errors Not Raised Below.* The alleged unconstitutionality of the act conferring upon boom companies the right of eminent domain, owing to defect in the title of the act, will not be considered on appeal, when not raised in the court below nor in the briefs in the supreme court.—*North River Boom Co. v. Smith* 138
9. *Erroneous Instructions—Binding on Jury.* Although an instruction to the jury may have been wrongfully given, it is binding and conclusive upon the jury.—*Pepperall v. City Park Transit Co.* 176
10. *Same—Law of Case.* An erroneous instruction, when not complained of and excepted to, constitutes on appeal the law of the case, and the record will not be examined at the instance of the respondent for the purpose of determining wherein it is erroneous.—*Id.* 176
11. *Review of Equity Case.* An equity cause will not be reversed for technical defects in pleadings, where it has been fairly tried and decided in accordance with the proofs.—*Mason v. McGee* 272
12. *Assignment of Error.* An assignment of error that the court erred in overruling a demurrer to an answer is
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APPEAL—CONTINUED.

- sufficiently definite, especially when the court in so ruling does not disclose its reasons therefor.—*Phelps v. Tacoma* . . . 367
13. *Effect of Appeal*. Where an appeal has been perfected, the superior court no longer has jurisdiction in the proceeding for the purposes of any action except those specially provided for in the act relating to appeals (Laws 1893, p. 119).—*State, ex rel. Mullen, v. Superior Court* 376
14. *Presentation of Questions in Lower Court*. A charge to the jury that the burden was on plaintiff to show what amount of damage he had suffered by reason of the failure of the contractor to complete the building in the time fixed by the contract and that they should allow him such amount as they found was established by the evidence, is not erroneous, when plaintiff has not specifically requested the court's construction as to whether the amount of damages for each day's delay was liquidated and fixed by the parties in their contract.—*DeMattos v. Jordan* 378
15. *Appeal Bond—Sufficiency of*. An appeal will not be dismissed for the reason that the affidavit of the surety in the appeal bond fails to state that such surety is worth the required amount over and above all debts and liabilities as required by the statute.—*Horton v. Donohoe Kelly Banking Co.* 399
16. *Bill of Exceptions—Settlement of*. A bill of exceptions will be stricken from the transcript on appeal, upon motion therefor, when no notice of its statement or settlement had been given to the adverse party as required by Laws 1893, p. 114, § 9.—*State v. Howard* 425
17. *Affidavits—How Incorporated in Record*. Where a motion and affidavit for continuance, improper statements of the prosecuting attorney to the jury, and papers used upon a motion for a new trial have not been made a part of the record in the cause by proper bill of exceptions or statement of facts, they will be stricken from the transcript, as the act of filing them with the clerk of the superior court does not raise the presumption that the attention of the lower court had thereby been directed to them.—*Id.* 425
18. *Discretion of Court—Motion for Default*. Where a motion for default for failure to plead within the time ordered by the court has been denied, it must be presumed on appeal that sufficient was shown to justify the exercise of the court's discretion in that regard.—*Plummer v. Weil* 427

APPEAL—CONTINUED.

19. *Notice of—Parties.* Notice of appeal must be served on all parties who have appeared in the action, even though such appearance may not have been made until the entry of a default against them.—*Cornell University v. Denny Hotel Co.* 433
20. *Same—Evidence of.* Under Laws 1893, p. 121, §5, where actual service of notice of appeal cannot be had upon a party or his attorney, the return of the sheriff to that effect is the only competent evidence of the fact sufficient to justify service upon the clerk in behalf of the party not found.—*Id.* 433
21. *Same—Service on Attorney.* The fact that notice of appeal is served upon an attorney for a certain defendant will not charge him with notice on behalf of another defendant for whom he also appears as attorney.—*Id.* 433
22. *Parties—Consolidated Causes.* The fact that an appeal involves two separate cases which had been consolidated pursuant to §1674, Gen. Stat., will not warrant the supreme court in entertaining jurisdiction of the appeal from a single decree entered therein, when some of the defendants have not been served with notice of appeal, although there may be a proper service upon all the defendants in one of the cases as originally instituted.—*Id.* 433
23. *Errors not Urged Below.* Errors not raised in the court below cannot be urged on appeal.—*State v. Owens* 468
24. *Motion for New Trial.* The denial of a motion for a new trial will not be disturbed on appeal, when the motion presented no questions not already passed upon by the court during the progress of the trial, and when no exceptions had been saved to errors committed by the court.—*Id.* 468
25. *Insufficiency of Brief.* When the brief of appellant fails to point out the errors relied upon for a reversal, the brief will, on motion, be struck from the record, and the judgment affirmed.—*Perkins v. Mitchell, Lewis & Staver Co.* 470
26. *Notice.* The fact that notice of appeal has been given but not served on all who had appeared in the action, will not preclude the parties not served from themselves giving notice of appeal and serving same upon all necessary parties; and, in such case, there is nothing objectionable in the abandonment of the first appeal, by those attempting it, and a joinder by them in a second one.—*Watterson v. Masterson* 511
27. *Insufficiency of General Objections.* The objections that a statement of facts had not been settled in conformity with

APPEAL—CONTINUED.

- the law and that the appeal had not been legally taken, will not be considered, when no specific error has been called to the court's attention either in the brief or by reference to the transcript.—*Payne v. Spokane St. Ry. Co.*..... 522
28. *Record—Presumptions as to Instructions not Included.* The failure of appellant to bring up more of the instructions than the paragraph complained of will not raise a presumption that the error was subsequently obviated by the court in its further instructions to the jury.—*Id.*..... 522
29. *Failure to Except to Findings of Fact.* When findings of fact made by the lower court are not excepted to, they must be considered on appeal as setting forth the facts in the case.—*McKee v. Whitworth.*..... 536
30. *Appeals from Board of Equalization.* An appeal does not lie from a board of equalization to the superior court.—*Knapp v. King County.*..... 541
31. *Appealable Order—Grant of New Trial—Motion for by Both Parties.* Where both parties to an action move for a new trial and it is granted on the motion of one and denied on the motion of the other, neither party can appeal therefrom for the reason that the order must be held to have been granted at the request of each.—*Clallam County v. Clump* 593
32. *Motion to Dismiss—When Must Appear in Brief.* A motion to dismiss an appeal, which is not set out in respondent's brief, will not be considered, when it raises no jurisdictional question.—*Luce v. Luce* 608
33. *Misconduct of Judge—How Shown—Record on Appeal.* The minutes of the clerk of the superior court and affidavits will not be received or considered by the supreme court for the purpose of showing the alleged misconduct of the trial judge, but the facts must be accepted as certified by the judge in the statement of facts settled by him.—*State v. Wroth.*..... 621
34. *Assignment of Errors—Sufficiency.* An assignment that the court erred in giving instructions will not be considered on appeal, when there is no specification in the brief as to what the error was. *State v. Zettler.*..... 625
35. *Same.* Under the supreme court rule 8, subd. 1, errors assigned by an appellant will not be investigated when his brief contains no reference to the pages of the transcript for verification. *Froelich v. Morse.*..... 636

APPEAL—CONTINUED.

36. *Notice of Appeal—Who Entitled to Service.* The fact that some of the defendants to an action come in, after the rendition of judgment and notice of appeal, and file an answer in the cause, although the same had been previously served on plaintiff's attorney, does not put them in a position requiring notice of appeal to be served on them. *Snohomish County v. Ruff*..... 637
37. *Appealable Order.* An order granting a motion to strike certain allegations from the complaint is appealable, when it affects a substantial right and determines the action as to the particular matter in issue.—*Id.*..... 637
38. *Notice of Appeal—Sufficiency of Service.* A notice of appeal, which is directed to all the parties appearing in the action, and duly served upon the attorneys appearing for them, is sufficient, although but one attorney may appear for several parties, and such attorney be served with but one copy of the notice. *Hendricks v. Edmiston*..... 687
See ATTORNEY AND CLIENT; CRIMINAL LAW, 1, 14; INJUNCTION, 2; JUDGMENT, 3; OFFICE AND OFFICERS; PLEADING, 7; PROHIBITION, WRIT OF, 1, 3; QUO WARRANTO, 6, 7.

APPEARANCE.

1. *What Constitutes.* The acceptance of service of a summons and complaint by an attorney for defendant and the endorsement thereon of appearance in the cause constitutes an appearance within the meaning of Code 1881, § 72, which provides that "a defendant appears in an action when he answers, demurs, or gives the plaintiff written notice of his appearance, or when an attorney gives notice of an appearance for him."—*Cornell University v. Denny Hotel Co.*..... 433
2. *Same.* Under Laws 1893, p. 412, § 16, providing that a defendant may appear in an action by giving the plaintiff written notice of his appearance or by making any application for an order therein, a defendant must be held to have appeared when he has entered into a written stipulation agreeing to the transfer of the cause to another county for trial.—*Jones v. Wolverton*..... 590

ASSIGNMENT FOR BENEFIT OF CREDITORS.

1. *Delivery of Deed to Assignee.* The delivery of a deed of assignment to the assignee for the purpose of having him in-

ASSIGNMENT FOR BENEFIT OF CREDITORS—CONTINUED.

dorse thereon his acceptance of the trust and its return by him to the assignor for the purpose of having it recorded by the latter, does not constitute such a delivery as will give the deed priority over chattel mortgages which had been duly executed, delivered and recorded prior to the record of the deed of assignment. *In re Day's Assignment*, 525

2. *Title of Assignee.* While an assignment transfers all of the property of an insolvent debtor to the jurisdiction of the court, it passes such property subject to all valid liens existing against it. *Gilbert Hunt Mfg. Co. v. Wheeler*, 594

See CHATTEL MORTGAGES, 4; CORPORATIONS, 2-4;
MORTGAGES, 8, 9.

ASSUMPSIT.

1. *When Lies Against County—Moneys Paid in by Sheriff.* Assumpsit will lie against a county for the recovery of sums charged by the sheriff as commissions upon foreclosure sales and by him mistakenly paid into the treasury, when such sums constitute a surplus in his hands to which the judgment debtor is entitled.—*Soderburg v. King County*... 194
2. *Same—Privity Between Parties.* Want of privity between the parties is no obstacle to an action for money had and received.—*Id.*..... 194

ATTACHMENT.

Trial of Title to Property—Question of Fraudulent Conveyance for Jury. Plaintiff is not entitled to a directed verdict in his favor, upon a trial of the right of ownership to property, attached as the property of another, but which was claimed by plaintiff under a bill of sale, when there is any testimony tending to show that the transfer to plaintiff was made with intent to hinder, delay or defraud creditors. *Burns v. Woolery*..... 134

See CORPORATIONS, 7, 8; COSTS; EXECUTION, 3;
FRAUDULENT CONVEYANCES, 1.

ATTORNEY AND CLIENT.

Disbarment Proceedings—Appeal by Petitioner—Interest of Appellant. Where judgment of dismissal of a petition for the disbarment of an attorney has been rendered, the petitioner has no such interest in the subject matter of the proceedings as will entitle him to prosecute an appeal therefrom.—*In re Ault's Disbarment*..... 417

BAILMENT.

Liability of Bailee for Conversion. Where the bailor of a certificate of shares of stock agrees with a purchaser that a portion of the shares shall be transferred to him in consideration of a certain price, a portion of which is paid down, and the bailee in whose hand the certificate is held, consents thereto and agrees to hold the stock for the purchaser and to deliver the same to him, first procuring the cancellation of the original certificate and the issuance of another one to the purchaser upon his paying the balance of the purchase price, such transaction amounts to a sale, and passes such a title to the purchaser as to authorize an action on his part to recover for the conversion of the stock.
—*Kahaley v. Haley*..... 678

SEE CONVERSION, 2.

BANKS AND BANKING.

1. *City Warrants Deposited as Cash.* In an action by a city to recover from a bank a sum of money alleged to have been deposited by its treasurer, the answer of the bank is demurrable, when it admits that it had given credit for the amount claimed as money received by it from the city treasurer, but alleges as a defense that no money had in fact been deposited, but merely city warrants which were void, the answer, however, making no offer to return the warrants or to account or them in any way.—*Tacoma v. German American, etc., Bank*..... 294
2. *Same—Estoppel of Bank.* A bank is estopped to dispute its indebtedness to a city, where at various times during a period of two years it has given a city credit for money deposited, and entered the amounts in a pass book delivered to and kept by the city treasurer, although in fact city warrants instead of money had been actually received by the bank, when it has allowed the city to transact its business upon the assumption that the money in question was on deposit, and no attempt was made by the bank to avoid the transaction for a period of a year and a half after the last of such deposits had been made.—*Id.*..... 294
3. *Double Liability of Stockholders—Enforcement by Receiver.* The fact that a banking corporation is insolvent and in the hands of a receiver will not entitle creditors to proceed against its stockholders upon their secondary liability, but such liability constitutes a part of the receiver's trust fund which the court is authorized to direct him to enforce for

BANKS AND BANKING—CONTINUED.

- the benefit of all the creditors. (*Wilson v. Book*, 13 Wash. 676, followed.) *Watterson v. Masterson*. 511
4. *Same*. The fact that an action by creditors against the stockholders of an insolvent bank includes the receiver of the bank as a party, will not entitle the creditors to enforce the contingent liability of the stockholders by a direct proceeding against them.—*Id.*. 511

BONDS. SEE APPEAL, 15; COUNTIES, 4, 5, 9.

BOOMS. SEE APPEAL, 8; CONSTITUTIONAL LAW, 2; EMINENT DOMAIN, 2.

BUILDING AND LOAN ASSOCIATIONS.

1. *Mortgage Foreclosure—Evidence*. In the foreclosure of a mortgage by a loan and building company the certificate of stock issued by it to defendant, with his assignment of the same to the company, is admissible in evidence, when reference thereto is made in the note and mortgage.—*United States Savings & Loan Co. v. Cade*. 38
2. *Loans—Premium and Interest—Default*. Where a note and mortgage given to a loan and building company provide that in case the maker fails to pay any installment of interest or make any monthly payment on certain stock in the company, which had been issued to him and assigned to the company as further security, for the period of three months after the same shall become due, then the whole sum with interest shall upon the election of the company become due and payable, the default does not become fixed for the purposes of the adjustment of the account between the parties, until the company elects to declare the entire amount due and payable, but until such time the contract continues in force entitling the company to accruing interest and payments upon the certificates of stock assigned to it.—*Id.*. 38

BURDEN OF PROOF. SEE CONTRACTS, 1; LIBEL AND SLANDER, 8.

CANCELLATION OF INSTRUMENTS.

1. *Right of Action—Coercion*. A complaint by heirs, which asks the rescission of a contract for the division of property of a decedent's estate, on the ground of false representa-

CANCELLATION OF INSTRUMENTS—CONTINUED.

tions and coercion, is demurrable when it appears from the facts pleaded that the parties were dealing at arms' length and that the parties seeking rescission had ample opportunity to know the amount and value of the property to which they were entitled at the time of the contract; and when it further appears that the alleged coercion was a threat of the other party to resign as administrator and delay the settlement of the estate unless they accepted his proposed compromise of their claims, when the effect of such resignation would have entitled such heirs to appointment in his stead to conduct the settlement of the estate, and there is nothing in the complaint showing that such heirs, who were women of mature years, were deficient in ordinary intelligence or incapacitated from transacting business.—*Sackman v. Campbell*.....

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2. *Same—Fraud*. In order to rescind a contract on the ground of fraud, an action therefor should be promptly commenced upon the discovery of the fraud.—*Id*.....

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3. *Same—Interests of Third Party*. The fact that a third party who is interested in a contract for the division of certain property is not a party to its abrogation is not a ground for the rescission of the subsequent contract, when it appears that such third party has never questioned or interfered with the agreement entered into between the other parties.

Id..... 57

SEE FRAUDULENT CONVEYANCES, 2.

CARRIERS.

1. *Injuries to Passengers—Contributory Negligence*. A passenger upon a freight train, which also carries passengers, who has been injured by the sudden starting of the train while alighting, is not guilty of contributory negligence, as a matter of law, in attempting to alight therefrom before it had pulled up to the depot platform, or before notice to get off had been given, when the train had come to a stop a few feet distant from the platform, where it appears that the train stopped at this time at its usual place of stopping, that it was customary for the passengers to get off at that place or when the first stop was made, and that the plaintiff had knowledge of such custom.—*Carroll v. Burleigh*.....

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2. *When Bound by Declaration of Ticket Agent*. A ticket seller in a union depot, whose business it is to sell tickets over

CARRIERS—CONTINUED.

- various lines of railway whose trains enter and depart therefrom, is such an agent of any company furnishing tickets to be sold there, which are accepted by the conductors of its trains as its tickets, that the company is bound by any of the declarations of such ticket seller as to the running of its trains.— *Turner v. Great Northern Ry. Co.* . . . 213
3. *Same*. Passengers have a right, until otherwise informed, to rely on formation received by them from ticket agents as to the arrival, departure and running of trains, in answer to inquiries concerning those matters, provided they do not disregard other reasonable means of information.— *Id.* . . . 213
4. *Breach of Contract to Carry—Damages*. Where a railroad company fails to fulfill its contract to carry a passenger to a certain destination, the company is liable for the expense thereby incurred, including the cost of conveyance by other means and also that incident to unavoidable delay.— *Id.* . . . 213
5. *Negligence—Degree of Care Required*. An instruction is erroneous which charges the jury in an action for injuries received by a passenger through defendant's negligence in running a street car at a high rate of speed, that "ordinary care is such care as persons usually engage in the particular line of business in question ordinarily exercise in and about such business. If defendant in this case exercised such care at the time of the accident, it had discharged its full duty and plaintiff cannot recover," since the highest degree of skill and care is required by law of a common carrier of passengers.— *Payne v. Spokane St. Ry. Co.* . . . 522
6. *Wrongful Ejection of Passenger—Evidence*. In an action to recover for wrongful ejection from a street car for alleged non-payment of fare, it is not error to refuse the admission of evidence on the part of defendant showing that plaintiff had been put off a railroad train for non-payment of fare, for the purpose of showing that he was in the habit of avoiding payment of car fare.— *Sprenger v. Tacoma Traction Co.* . . . 660
7. *Same—Duty of Passenger to Mitigate Damages*. The fact that a passenger ejected from a car for alleged non-payment of fare could have prevented his ejection by surrendering to the conductor another ticket which he had in his possession, would not reduce the damages growing out of the wrongful act of the conductor to the sum represented by the value of the ticket, when the evidence shows that,

CARRIERS — CONTINUED.

with the delay of a few minutes, the conductor could have made an investigation which would have definitely determined whether or not the plaintiff had paid his fare.—*Id.* . . . 660

See DAMAGES 1, 3.

CERTIORARI.

When Lies. Certiorari will lie for the purpose of reviewing the action of a municipal court in a proceeding brought therein for the purpose of securing the conviction and punishment of one guilty of violating a city ordinance.—*Seattle v. Pearson.* . . . 575

CHATTEL MORTGAGES.

1. *Removal of Property from County—Failure to Record Mortgage.* Under Gen. Stat., § 1649, which provides that when mortgaged personal property is removed from the county, it is, except as between the parties, exempted from the operation of the mortgage, unless, within thirty days after such removal, the mortgage is recorded in the county to which the property has been taken, one who acquires such property more than thirty days after its removal to another county is entitled to the possession thereof, when the mortgage had not been recorded in such county, although such subsequent purchaser had knowledge of the incumbrance and the property had been removed from the county of its location when mortgaged without the knowledge or consent of the mortgagee.—*Turner v. Culdwell.* . . . 274
2. *Delivery—What Constitutes.* The leaving of a fully executed chattel mortgage with the attorney for the mortgagee constitutes a delivery to the latter.—*In re Day's Assignment.* . . . 525
3. *Same. Acceptance by Creditor.* Where a debtor has been requested by creditors to give them security upon his property whenever it shall become necessary to protect their interests, the execution by him and placing of record of chattel mortgages in their favor will be presumed to be with their consent and consequently effective as a valid delivery.—*Id.* . . . 525
4. *Foreclosure Pending Assignment for Benefit of Creditors.* Where leave to foreclose a chattel mortgage has been granted by the court, upon the petition of the mortgagee subsequent to an assignment for the benefit of creditors,

CHattel Mortgages — CONTINUED.

made by the mortgagor, it is error for the court to dismiss same on the motion of the assignee on the ground of the pendency of said assignment.—*Gilbert Hunt Mfg. Co. v. Wheeler*..... 594

COMMUNITY PROPERTY. See HUSBAND AND WIFE, 2-10.

CONSTITUTIONAL LAW.

1. *Self-Executing Provisions—Compensation of Justices of Peace.* Art. 4, § 10, of the constitution, providing that, in incorporated cities or towns having more than five thousand inhabitants, the justices of the peace shall receive such salary as may be provided by law, is self-executing with reference to the matter of population, merely the matter of fixing salaries being referred to the legislature, and the courts are justified in receiving testimony to determine the amount of population.—*Anderson v. Whatcom County*.. 47
2. *Special Privileges by Legislative Enactment.* A law conferring the right of eminent domain upon boom companies is not open to the objection that it contravenes the constitutional prohibition (art. 2, § 28) against the enactment of special laws granting corporate powers or privileges.—*North River Boom Co. v. Smith*..... 138
3. *Delegation of Power.* A legislature having no authority under the constitution to pass laws partaking of the character of special legislation, it cannot delegate such power to a city council.—*Tacoma v. Krech*..... 296
4. *Special Legislation—Ordinance Against Barbers Pursuing Calling on Sunday.* An ordinance of a city prohibiting barbers from pursuing their calling on Sunday for compensation, is void as an act of special legislation, as it singles out one class of people and imposes restrictions upon them which are not imposed on other citizens alike.—*Id.*..... 296
5. *Establishment of Diking Districts—Authority to Levy Special Assessments.* An act of the legislature providing for the establishment of diking districts, the construction and maintenance of dikes and the assessment of property benefited to pay therefor, is not unconstitutional under art. 7, § 9, of the constitution, which seems to restrict the delegation of legislative power to authorize local improvements the special assessment, or by special taxation of property benefited to the corporate authorities of cities, towns and villages,

CONSTITUTIONAL LAW—CONTINUED.

- when the same section further, provides that "for all corporate purposes, all municipal corporations may be vested with authority to assess and collect taxes, and such taxes shall be uniform in respect to persons and property within the jurisdiction of the body levying the same,"—*Hansen v. Hammer*..... 315
6. *Same—Due Process*. Upon the formation of a diking district under Laws 1895, p. 304, personal service upon every person within the district of notice of the petition to organize the district is unnecessary, and failure to give such personal service would not constitute a taking of private property without due process of law.—*Id* 315
7. *Privileges and Immunities—Qualifications of Jurors*. The act of March 19, 1895 (Laws 1895, p. 139), requiring persons impaneled as jurors to be householders, but making no such requirements of those summoned upon an open venire to complete the panel, is not unconstitutional as a violation of art. 1. § 21, of the constitution, which provides that "no law shall be passed granting to any citizen, class of citizens . . . privileges or immunities which, upon the same terms, shall not equally belong to all citizens."—*Redford v. Spokane St. Ry. Co.*..... 419
8. *Uniformity of Laws*. Where a law is uniform in its operations, in so far as it operates at all, its constitutionality is not affected by the number of persons within the scope of its operation.—*Id*..... 419
- See APPEAL, 8; COUNTIES, 1, 2; EMINENT DOMAIN, 1, 6, 7;
HOMICIDE, 3; JURY, 2; STATUTES, 1, 2, 4, 7, 8.

CONTEMPT. See PROHIBITION, WRIT OF, 1.

CONTRACTS.

1. *Breach Through Act of God—Burden of Proof*. Where work under a contract has been suspended because of plaintiff's inability to proceed therewith owing to acts of God preventing the work, there is no breach of contract, and where defendant enters and dispossesses plaintiff prior to the period fixed by the contract for completing the work, the burden of proof is on defendant, in an action to recover damages for breach of contract, to prove that plaintiff was not ready and willing to continue in the performance of said work and refused to go upon said land as soon as it was in condition to have work done upon it.—*Asplund v. Mattson*..... 326

CONTRACTS—CONTINUED.

2. *Abandonment of—Grounds for.* The fact that the contractor was compelled, by the person with whom he had contracted for the erection of a building, to pay his debts due to other parties, would not constitute a valid excuse for his abandoning his contract.—*DeMattos v. Jordan*..... 378
See BUILDING AND LOAN ASSOCIATIONS, 2; INJUNCTION, 1.

CONVERSION.

1. *What Constitutes Conversion of Corporate Stock.* The surrender of a certificate of stock to one not entitled to it, who procures its cancellation and the issuance of a new certificate to himself, amounts to a conversion of the stock.—*Kahaley v. Haley*..... 678
2. *Action for—Evidence.* In an action to recover for the conversion of shares of stock by a bailee instituted by one who had purchased a portion of the shares, on account of the bailee's having surrendered all the shares to a third party assuming to be a purchaser of the whole of them, evidence tending to show that such third party paid the bailee in full for all the stock is immaterial.—*Id* 678
See BAILMENT.

CORPORATIONS.

1. *Enforcement of Contract of Trustee.* Contracts made by the trustee of a corporation may be enforced by it in its own name.—*Moody v. Noyes*..... 128
2. *Receivers—Appointment for Insolvent Corporation—Assignment for Benefit of Creditors—Rights of Assignee as against Receiver.* The making of a general assignment of its property for the benefit of creditors by an insolvent corporation can have no effect upon the power of a court, under Code Proc., § 326, to appoint a receiver at the instance of a creditor of the corporation.—*Oleson v. Bank of Tacoma*..... 148
3. *Same.* A deed of assignment by an insolvent corporation can be set aside by the court, upon the subsequent appointment of a receiver at the suit of a creditor of the corporation.—*Id*..... 148
4. *Same.* A receiver having been appointed for an insolvent corporation, he is entitled to the possession of all of the assets of the corporation, as against an assignee holding under a prior voluntary assignment executed by the corporation while insolvent.—*Id*..... 148

CORPORATIONS — CONTINUED.

5. *Insolvent Corporation—Fraudulent Preferences—Judgment by Confession.* A judgment by confession, made by an insolvent corporation in favor of one of its creditors, who has knowledge of its insolvent condition, and which confession is given and accepted for the purpose of making a preference in favor of such creditor over others, is void as against the other creditors.—*Compton v. Schwabacher Bros. & Co.* 306
6. *Same—Action by Receiver to Set Aside.* A receiver for an insolvent corporation is not estopped from assailing a confession of judgment by the corporation as fraudulent by reason of the fact that in a former receivership the receiver had treated the judgment as valid, and had been discharged by the court upon a false representation that all the debts of the corporation, except a balance on such judgment, had been paid.—*Id.* 306
7. *Same—Attachment by Creditor.* The fact that an order of court is made refusing to dissolve an attachment under sec. 318, Code Proc., does not establish the validity of such attachment as against creditors, but it may be attacked by the receiver.—*Id.* 306
8. *Same—When May be Set Aside.* An attachment levied upon the property of an insolvent corporation by a creditor having knowledge of its condition may be set aside, although insolvency proceedings had not been instituted, under the rule in this state constituting the assets of an insolvent corporation a trust fund for the benefit of all its creditors.—*Id.* 306
9. *Enforcement of Unpaid Stock Subscriptions—Res Judicata.* A judgment against stockholders of a bank for the recovery against them of their contingent liability over and above the par value of their stock cannot be pleaded as *res judicata* in an action by the receiver of the bank to recover unpaid subscriptions to the amount of the par value of the stock. *Barto v. Nic.* 563
10. *Same—Estoppel to Dispute Liability.* In an action by a receiver of a bank to enforce stock subscriptions, the defendants, who were directors in the bank, are estopped from setting up that the bank stock had been issued by the bank to them and their notes taken therefor, under a secret agreement that they should not be liable thereon.—*Id.* 563
11. *Right of Corporation to Receive its Stock for Debts.* A corporation has authority to receive from a stockholder his certificates of stock in payment of his indebtedness to it, when

CORPORATIONS—CONTINUED.

such transaction is *bona fide* and for the purpose of protecting the corporation from loss; and stock so taken may be re-issued by the corporation.—*Id.*..... 563

12. *Collection of Subscriptions by Receiver—Presumption as to Necessity.* Where, in an action for the appointment of a receiver for a corporation, the court had determined that unpaid assessments upon the capital stock should be collected, it must be presumed, in an action brought by the receiver for their collection, that such determination was necessary and rightful, although from the record in the original action it may appear that the assets of the bank were sufficient to discharge its indebtedness.—*Id.*..... 563

13. *Illegal Corporation—Quo Warranto Against—Appointment of Receiver.* The superior court has no power to appoint a receiver for a corporation, upon the institution by the state of *quo warranto* proceedings seeking to oust it from the exercise of corporate powers, since, under the provisions of Code Proc., § 689, authority to appoint receivers in such cases is specially provided in event of judgment against the corporation.—*State ex rel Amsterdamsch Trustees Kantoor.* 663

14. *Same — Question of Corporate Existence — How Raised.* Whether the corporation is one *de jure* or merely *de facto*, it is entitled to the possession of its property until deprived thereof by the judgment of a court of competent jurisdiction, and the question of corporate existence cannot properly be raised in a prohibition proceeding, which seeks to restrain the action of the superior court in appointing a receiver in excess of its jurisdiction.—*Id.*..... 668

SEE BANKS AND BANKING, 3, 4; BUILDING AND LOAN ASSOCIATIONS; TRIAL, 4.

COSTS.

Dissolution of Attachment—Right of Receiver to Costs. An attachment creditor who withholds possession from a receiver of the property of an insolvent corporation, which had been obtained by attachment levy, is not entitled to recover costs paid to the sheriff for the care and custody of the property levied on, including rent of the premises where the property had been kept, in an action instituted by the receiver to dissolve the attachment.—*Compton v. Schwabacher Bros. & Co.*..... 306

SEE PROHIBITION, WRIT OF, 2.

COUNTIES.

1. *Loan of Credit.* An act authorizing counties to condemn land for a right-of-way for a ship canal projected by the general government, is not a violation of art. 8, § 7, of the constitution, which forbids counties giving any money or property, etc., to or in aid of any individual, association, company or corporation, etc., as neither the state nor the United States can be brought within the meaning of the section.—*Lancey v. King County*..... 9
2. *Incurring Debt for Other than County Purposes.* Such undertaking is not open to the objection that it is in violation of art. 8, § 8, of the constitution, which prohibits a county from incurring debt for any other than strictly county purposes, as it is entirely within the limits of the county, and for the purpose of connecting two large local waterways with the Pacific ocean.—*Id*..... 9
3. *County Commissioners—Compensation—Right to Mileage.* County commissioners are not entitled to charge mileage under Code 1881, § 2670, permitting mileage, since Laws 1889-90, p. 305, § 2, which provides that they "shall receive five dollars per day for each day employed in performance of their duties," expressly declares that its purpose is to fix the salaries of county officers, and that all acts in conflict with its provisions are repealed.—*State, ex rel. Heaton, Beman* 24
4. *Issuance of Bonds—Medium of Payment.* When legislative authority is given to a county to issue funding bonds, without any restriction as to the kind of money in which they shall be payable, the county has discretion to issue such bonds as will best accomplish the general object to secure which their issue was authorized.—*Packwood v. Kittitas County* 88
5. *Same—Payment in Gold.* When authority is conferred upon a county to issue bonds, the county is authorized to make them payable in gold, when there is no legislative restriction thereon, especially in view of the circumstance that it had been customary in this state and territory, prior to the grant of legislative authority, to make such bonds payable in gold, as it must be presumed it was the intention of the legislature that the former custom should be followed.—*Id*..... 88
6. *Interest Coupons on Bonds—Warrants—Priority of Payment.* Under Gen. Stat., § 2681, providing that interest coupons

COUNTIES—CONTINUED.

on the bonded indebtedness of counties should rank as warrants upon the general fund, the holder of county warrants issued subsequent thereto and subsequent to the act of 1893 (Laws 1893, p. 250, § 2), providing that "all warrants drawn on the funds of the county shall be redeemed by the treasurer in the order of their issuance," is not entitled to have his warrants paid as long as there are insufficient funds to meet any interest coupons that may be due.

—*Munson v. Mudgett*..... 321

7. *Same*. Where interest coupons upon county bonds are by their term payable at a designated time and require no presentation for the purpose of fixing the time and order of payment, their payment cannot be postponed and the rights of the holders subordinated to those of the holders of county warrants subsequently issued.—*Id*..... 321

8. *Warrants of School Districts—Indorsement by County Treasurer—Liabilities*. The provisions of Laws 1893, p. 268, § 7, making it the duty of the county treasurer not to register and indorse warrants issued by the officers of school districts unless the signatures thereon correspond with the signatures of the officers of the district on file in his office, are intended for the protection, not of the public at large, but of the county and the school districts therein, and no action will lie against a treasurer and his sureties, by the holder of a forged school district warrant, who claims to have purchased same on the strength of such treasurer's indorsement.—*Roberts v. Prescott* 462

9. *Breach of Auditor's Bond—What Constitutes*. The sureties upon the bond of a county auditor are liable for his failure to account for moneys received as purchasing agent of the board of county commissioners, under statutes providing that the auditor should be *ex officio* clerk of the board and making it his duty as such clerk to perform all the duties required by law or any rule or order of the board, when he has been required by order of the board to act as purchasing agent for them.—*Snohomish County v. Ruff*..... 637

See APPEAL, 30; ASSUMPSIT, 1; COURTS, 1; ELECTIONS.

COURTS.

1. *Legislative Control of Court Districts*. Construing in the light of the circumstances surrounding the adoption of the constitution and the legislative construction thereof, art. 4, § 5, of that instrument, which provides that "There shall

COURTS—CONTINUED.

be in each of the organized counties of this state a superior court, for which at least one judge must be elected by the qualified voters of the county at the general state election; provided, that until otherwise directed by the legislature "judges shall be elected pursuant to certain groupings of counties set forth in such section, it must be held that it was thereby intended to vest in the legislature the discretion to determine as to when each of the counties should elect a judge for itself, and how the counties not entitled to so elect should be grouped for judicial purposes.—*State, ex rel. Dustin, v. Rusk*..... 403

2. *Municipal Courts—Jurisdiction—Assault and Battery.* The constitutional provision requiring all offences theretofore prosecuted by indictment to be thereafter prosecuted by information or indictment does not require an information or indictment against one charged with assault and battery in a municipal court or that of a justice of the peace, since the offence was within the jurisdiction of a justice of the peace before the adoption of the constitution.—*State v. Gleason*.. 509

See APPEAL, 13; CERTIORARI; PROHIBITION, WRIT OF, 3;
STATUTES, 6, 7.

CRIMINAL LAW.

1. *Appeal—Failure to Urge Errors.* The fact that oral instructions were given to the jury in the absence of defendant cannot be urged on appeal when it does not appear from the record what the instructions were, nor from any source that they were prejudicial, nor that the matter was called to the attention of the court upon a motion for a new trial.—*State v. Nichols*..... 1
2. *Secondary Evidence—Failure to Produce Written Memorandum.* The fact that notice had been served upon the state to produce a certain memorandum book at the trial of a criminal prosecution, which the state was unable to produce for the reason that it had been removed from the jurisdiction of the court, will not preclude the state from contradicting oral testimony on the part of the defendant as to the contents of an entry in dispute.—*State v. Baldwin* 15
3. *Modification of Instructions.* It is not error upon the part of the court to refuse to give instructions in the language requested, although the same may correctly state the law, if the court fairly gives substantially the same instructions in other language.—*Id*..... 15

CRIMINAL LAW—CONTINUED.

4. *Sufficiency and Weight of Evidence.* Although the evidence in a criminal case may not have been of the most satisfactory and convincing kind, yet the verdict of the jury should not be disturbed on appeal, if there was evidence tending to establish every material fact necessary to show the guilt of the defendant. (*State v. Kroenert*, 13 Wash. 644, followed.)
State v. Murphy 98
5. *Instructions—Judicial Explanation of Defendant's Plea.* The fact that the court explains to the jury the nature and legal effect of defendant's plea is not open to the objection that it is a judicial comment on the facts instead of the law.
State v. Carter 121
6. *Same—Credibility of Witness.* A charge to the jury that they are warranted in disregarding the testimony of any witness if they believe that he has wilfully testified falsely to any matter is not prejudicial, when the error of the court in not stating that the falsity should be in a material matter was not raised by the exception taken, nor the court's attention called to the inadvertence at the time.—*Id.* 121
7. *Writs Coram Nobis—Sufficiency of Showing Made.* Admitting, but not deciding, that the writ *coram nobis* might issue from a superior court of this state to inquire into certain alleged misstatements by the prosecuting witness upon the trial of a criminal cause, the petition therefor would not be sufficient when based upon the claim that the testimony of such witness "was not in accordance with the facts but was fraudulent and untrue."—*State, ex rel. Davis, v. Superior Court* 339
8. *Conduct of Trial—Special Counsel.* It is within the discretion of the court to allow special counsel to aid the prosecuting attorney in the prosecution of a case, and such discretion will only be interfered with upon a showing of an abuse thereof.—*State v. Elwood* 453
9. *Same—Withdrawal of Case From Jury.* When there is evidence tending to show every fact necessary to establish the guilt of defendant, the court is not warranted in taking the case from the jury.—*Id.* 453
10. *Same—Leading Questions.* The action of the court in allowing leading questions is a matter so largely within its discretion as to call for the interference of the appellate court only in extreme cases.—*Id.* 453

CRIMINAL LAW—CONTINUED.

11. *Review—Sufficiency of Evidence.* The supreme court will not set aside a verdict in a criminal case when there is testimony tending to show every necessary fact, and when the court which tried the cause has refused to interfere with the verdict.—*Id.* 453
12. *When Erroneous Instructions Harmless Error.* In a criminal prosecution, in which the only testimony introduced is on the part of the state, and there is no substantial conflict in that, but the proofs conclusively show the guilt of the defendant, errors committed in charging the jury are without prejudice.—*State v. Witherow* 562
13. *Sale of Adulterated Butter—Sufficiency of Complaint.* A complaint, under Laws 1895, p. 70, §5, making it unlawful for any person to sell any fat, oil or oleaginous substance or compound thereof, not produced at the time of manufacture from unadulterated milk or cream from the same, with or without harmless coloring matter, which shall be in imitation of yellow butter produced from pure unadulterated milk or the cream from the same, is not sufficient, when it fails to charge as a fact that the oleaginous substance and compound was not produced from unadulterated milk or the cream from the same.—*State v. Henderson* 598
14. *Record on Appeal—Insufficiency of Evidence.* The alleged insufficiency of the evidence to sustain a verdict of guilty will not be considered on appeal, when the record does not purport to contain all the material facts, matters and proceedings produced and had at the trial.—*State v. Zettler* ... 625
15. *Misconduct of Bailiff—Unduly Influencing Jury by Threats.* The fact that the bailiff informed the jury that, if they did not return a verdict by a certain hour, he would keep them locked up all night, does not amount to misconduct when the statement was made, not for the purpose of influencing the jury in their action, but to inform them that it was the intention of the court to go home at that hour, and that, if the verdict was not returned before that time, it could not be till morning.—*State v. Zettler*..... 625

See APPEAL, 17; COURTS, 2; EMBEZZLEMENT; HOMICIDE;
INDICTMENT AND INFORMATION; JURY, 2-5; LARCENY;
LIBEL AND SLANDER, 1, 2; MUNICIPAL CORPORATIONS,
21; OBSCENITY.

DAMAGES.

1. *Breach of Contract to Carry Passenger—Damages.* Damages cannot be recovered for anxiety and suspense of mind

DAMAGES—CONTINUED.

in consequence of delay caused by the fault of a common carrier in failing to transport a passenger to his destination pursuant to contract. (*Willson v. Northern Pacific R. R. Co.*, 5 Wash. 621, distinguished.)—*Turner v. Great Northern Ry. Co.*..... 213

2. *Same—Loss of Time as Attorney—Measure of Damages.* The measure of damages for the loss of time incurred by an attorney through failure of a railroad company to transport him, is not what the time of practicing attorneys of his capacity is worth, but the most trustworthy basis would be his earnings as an attorney either before or after the particular time in question.—*Id.*..... 213

3. *Same.* An instruction to the jury that, for loss of time, plaintiff, who was an attorney, was entitled to recover such sum as his time at home, for the period he was delayed by reason of defendant's failure to transport him, was reasonably or fairly worth in his profession, is misleading when the only proof of the value of such time was the opinion of the plaintiff and other witnesses as to what it ought to be worth; and it is also misleading in view of the further fact that it left out of consideration the probability that plaintiff would have had professional employment, had he been at home during the period of his detention.—*Id.* 213

4. *Remission by Court of Excessive Damages.* Where the trial court finds that a portion of the damages assessed by the jury is excessive, it is not required to grant a new trial, but may properly direct a remission of the excessive portion of the verdict.—*McDonough v. Great Northern Ry. Co.* 244

5. *Breach of Contract to Convey Land—Measure of Damages.* The measure of damages for the breach of a contract to convey an undetermined piece of land is the amount of money paid upon such contract with interest thereon from the date of such payment.—*Marsh v. Caranagh.*..... 282

See APPEAL, 14; CARRIERS, 4, 7; EMINENT DOMAIN, 3-5.

DEEDS.

1. *Delivery—Effect of Record.* The recording of a deed by the grantor is a sufficient delivery to convey title where the conveyance is for the benefit of an infant, as in such case the infant will be presumed to have accepted it.—*Bjmerland v. Eley* 101
2. *Same—Evidence Necessary to Rebut Presumption.* The presumption that the recording of a deed to an infant by the

DEEDS—CONTINUED.

grantor is evidence of his intention to convey, can be overcome only by the strongest kind of proof that the grantor's intention in making the conveyance was to defraud existing creditors; the fact that, subsequent to the conveyance, the grantor enters into dishonest schemes to defraud others by another sale of the same land not being sufficient to affect the validity of the prior deed to the infant.—*Id.* 101

3. *Delivery of Deed—What Constitutes.* Delivery of a certain deed found among the papers of the grantor after his death cannot be presumed, when the only evidence thereof is that the grantor made the deed and intended that at some time the grantees therein named should become the owners of the land therein described, but there is nothing tending to show that he ever did anything in connection with the deed, or said anything in reference thereto, which clearly showed his intention that the title should pass from himself to the grantees named during his lifetime.—*Atwood v. Atwood* 285

4. *Delivery in Escrow—Waiver of Conditions.* A finding that the conditions upon which a deed had been placed in escrow has been complied with is warranted, when it appears that the condition was solely for the benefit of the grantee and could be waived by him, and that he had waived such condition by taking the deed and placing it of record.—*Hendricks v. Edmiston*..... 687

See ASSIGNMENT FOR BENEFIT OF CREDITORS, 1; HUSBAND AND WIFE, 10, 11.

DIKES. See EMINENT DOMAIN, 6, 7.

DIVORCE.

1. *Jurisdiction over Property—Presumptions.* Where a decree of divorce awards all the community personal property in the state to the wife, the jurisdiction over all of the property so awarded must be presumed in the absence of a showing to the contrary, and replevin by the husband will not lie to recover a portion of such personal property sold by the wife to a third party.—*Carney v. Simpson*..... 227
2. *Custody of Children.* The care and custody of children of tender years should be awarded to the mother upon the granting of a divorce, when it is not made to appear that the mother is not a proper person to have the care and control of her children.—*Smith v. Smith*..... 237

DIVORCE—CONTINUED.

3. *Grounds—Inability to Live Peaceably Together.* Code Proc., §764, subd. 7, providing that "a divorce may be granted upon application of either party for any other cause deemed by the court sufficient, and the court shall be satisfied that the parties can no longer live together," lodges a discretionary power in the court which must be exercised in a sound and legal manner so as to conduce to domestic harmony and the peace and morality of society.—*Colvin v. Colvin*... 490
4. *Same.* A court is warranted in refusing a divorce, although finding that the parties cannot live peaceably together, when such failure is due to their own obstinacy and stubbornness, and both parties are equally in fault.—*Id.*..... 490
5. *Allowance of Attorney Fees to Wife.* The allowance by the court of \$300 as counsel fees to the wife, in refusing the husband's petition for divorce, is not an abuse of the discretion reposed in the court in such matters, even though it may appear that a division of property had been made between the parties and that the wife was amply able to bear the expenses attending the action.—*Id.*..... 490
6. *Proof of Residence.* In an action for divorce plaintiff must affirmatively plead, and satisfactorily prove, prior residence in the state for the period of a year or more.—*Luce v. Luce* 608
7. *Grounds—Abusive Treatment.* Plaintiff is not entitled to a divorce upon the ground of abuse, when the only evidence to support the action is proof, in the most general terms, of abusive language on the part of defendant, and plaintiff's own testimony shows that he was alike culpable.—*Id.*..... 608

DOMICILE.

Acquisition of—Evidence. The fact that plaintiff left his home in the East and came to the state of Washington in search of a location, afterwards going to the state of California in pursuit of the same object, and then returning to the state of Washington, where he settled and went into business, is not sufficient to establish his residence here before his return from California, in the absence of proof of any intention to make a definite location in this state prior to his actual settlement.—*Luce v. Luce* 608

See DIVORCE, 6.

ELECTIONS.

Validating Election—Notice. A notice of election for the purpose of validating county warrants, given under the pro-

ELECTIONS—CONTINUED.

visions of Laws 1893, p. 181, need not specify the polling places in the county where the election is to be held, but is sufficient when it gives a general notice as to when the election would be held throughout the county, since the general election law requiring notices to be posted in the several precincts affords the voters opportunity to ascertain where in each precinct the election would be held.—*Packwood v. Kittitas County* 88

EMBEZZLEMENT.

1. *By Public Officer—Information.* An information charging one as having received by virtue of his office as county clerk a sum of money belonging to the county, which he unlawfully, knowingly, fraudulently and feloniously took and converted to his own use and embezzled, is sufficient to charge a crime under the provisions of § 57, Penal Code.—*State v. Downing* 413
2. *Same—Instructions.* Where a prosecution of a public officer for the embezzlement of public funds is had under Penal Code, § 57, making the offense a felony, an instruction to the jury based on that theory is not erroneous, although another statute may provide for the punishment of such acts as misdemeanors.—*Id.* 413

EMINENT DOMAIN.

1. *Exercise for Benefit of United States.* The fact that an act authorizes the exercise of the state's eminent domain for the purpose of constructing a ship canal which shall be under the control of the general government, but for the use and benefit of the public generally, will not render the act unconstitutional, when there is no express constitutional provision prohibiting it.—*Lancey v. King County*.... 9
2. *Appropriation of Tide Lands by Boom Company—Parties.* The state is not a necessary party to an action for the appropriation by a boom company of tide lands, which the state has contracted to sell, as the state's interest in land is not subject to condemnation.—*North River Boom Co. v. Smith*..... 138
3. *Obstruction of Street by Railway Track—Damage to Abutting Property.* Where, under an agreement between a millowner and a railroad company, a railroad switch has been constructed by the millowner, from the railroad to a mill for the purpose of running cars over same for the benefit of the

EMINENT DOMAIN—CONTINUED.

- mill, the millowner cannot escape liability for damages occasioned by the necessary operation of the switch in the customary manner, although the trains may be run and operated by the railroad company.—*Patton v. Olympia Door and Lumber Co.* 210
4. *Same.* If the owner of a lot has been damaged in a manner different from that of the public generally by the appropriation of a street for railroad purposes, he is entitled to compensation.—*Id.* 210
5. *Same.* There is proof of damages peculiar to plaintiff in the construction and operation of a railroad track in the street in front of his dwelling house, when it appears that the track runs so close to the sidewalk that a team cannot stand between them clear of the track, and that the dwelling house is damaged and rendered of less value by the running of trains over the track.—*Id.* 210
6. *Construction of Dykes—Compensation to Owner.* A law providing for the condemnation of rights of way for the construction of dykes is not unconstitutional as authorizing a taking of private property without full compensation thereof having been made in money, when provision is made therein for ascertaining the cost and collecting same by assessment or the issuance of bonds, as the presumption would be that compensation would be provided in this manner before actual construction began.—*Hansen v. Hammer.* 315
7. *Same—Public Purpose.* The appropriation of land for the construction of local dikes within the territory of dyking districts authorized by law to be formed is a taking for a public purpose.—*Id.* 315

SEE CONSTITUTIONAL LAW, 2; COUNTIES, 1, 2.

EQUITY.

1. *Implied Trust—Enforcement—Pleading—Laches.* In an action by stepchildren against the executor of their stepfather's estate to have same declared a trust in their favor on the ground that some fifty years before in the year 1842, while they were small children, he had married their mother and had taken the proceeds of their father's estate amounting to \$500., and had during half a century so invested it as to realize an estate worth several millions, the complaint is subject to demurrer when it appears that plaintiffs had never pressed their claims for a period of over

EQUITY—CONTINUED.

- thirty years after attaining their majority, and contains the bare allegation as a reason for such laches, that they had no knowledge of their rights until the year 1891, their stepfather having concealed the facts from them and claimed the ownership of the property, but nothing appearing to show fraudulent concealment on his part.—*Sackman v. Campbell*. 57
2. *Same*. In such a case, in order to avoid the charge of laches, the complaint should make a clear and explicit statement of all matters connected with their failure to assert their rights at an earlier date, including the source of their final knowledge as to their rights, when and how obtained, etc.—*Id*. 57
3. *Enforcement of Liens*. A lien by contract is enforceable in equity, although the contract does not amount to a legal mortgage.—*Moody v. Noyes*. 128
4. *Same—Priorities*. Where the object of an action is to have the interest of the defendant established and the priorities adjusted as between plaintiff and defendant, plaintiff cannot complain that defendant, although holding nothing more than a lien interest in the property, is awarded the priority of lien, when the evidence sustains such a finding.—*Id*. 128
- SEE APPEAL, 11; CANCELLATION OF INSTRUMENTS;
EXECUTORS AND ADMINISTRATORS, 8; REFORMATION
OF INSTRUMENTS.

ESTOPPEL.

1. *Unauthorized Sale by Administratrix—Cannot Dispute Contract*. Where an administratrix has sold timber upon lands of her intestate for a fair price to parties purchasing in good faith, and, after having received from them almost the whole purchase price and refused to receive the balance, the amount received having been appropriated to the use and benefit of herself and the estate, and accounted for in her report to the court, she cannot come into a court of equity and rescind her sale and deprive the purchasers of the benefits thereof simply on the ground that she was not authorized by the court to make the sale as required by statute.—*Davis v. Ford* 107
2. *Invalidity of License*. Even if an unauthorized sale of timber by an administratrix was merely a license to cut and remove the timber, she is estopped from taking advantage

ESTOPPEL—CONTINUED.

- of its invalidity, when the licensee has acted in good faith and paid her a valuable consideration therefor.—*Id.*..... 107
3. *Same.* Where timber has been cut from land under authority of a license granted by an agent, the licensee and his assigns are estopped to deny the authority of the agent to execute the license.—*Moody v. Noyes*..... 128
4. *Must be Pleaded.* Matter claimed to operate as an estoppel must be pleaded in order to authorize its admission in evidence.—*Jacobs v. First National Bank*..... 358
5. *In Pais.* The owner of abstract records who so far treats them as valuable property as to secure a loan by the execution of a chattel mortgage thereon, is estopped from setting up as a defense to foreclosure proceedings that the records would be of no value in the hands of any but the compiler.—*Washington Bank v. Fidelity Abstract & Security Co* ... 487
6. *Same — Relevancy of Representations Relied On.* One who holds the legal and record title to real estate is not estopped from setting up his ownership as against one to whom he had stated that he had transferred it to a third party, and who subsequently purchases it at execution sale as the property of such third party, when the statement as to ownership was made several months before the levy of execution and in connection with a proposition at the time for a trade of the premises.—*Lyons v. Fowler*..... 618
7. *By Record — Knowledge of Party Relying on Transaction — Bona Fides.* Where one holding the legal title to land participates in a conveyance thereof made by her grantor to a subsequent grantee, she is estopped from setting up her title as against such subsequent grantee, although he knew the property had been transferred to her, when it appears that she had no beneficial interest in the property, as it had been conveyed to her merely for the purpose of putting it out of the reach of creditors of her grantor.—*Hendricks v. Edmiston*..... 687

See APPEAL, 4; BANKS AND BANKING, 2; CORPORATIONS, 6, 10; EXECUTORS AND ADMINISTRATORS, 1; MORTGAGES, 4; MUNICIPAL CORPORATIONS, 1; REPLEVIN, 3; SCHOOL LANDS, 3.

EVIDENCE.

1. *Relevancy.* Where by the terms of a subsidy bond the obligee was given until September 1, 1890, to complete a

EVIDENCE—CONTINUED.

- certain amount of railroad line, in an action upon the bond after that date, evidence showing the condition of the road July 1, 1890, is inadmissible.—*Port Townsend, etc., R. R. Co. v. Coleman*..... 77
2. *Proof Affecting Written Instruments.* Where the object of an action is to affect a written instrument, only clear and satisfactory proof will justify a decree in favor of the plaintiffs.—*Thorne v. Joy*..... 83
3. *Proof of Signature.* The testimony of a witness as to the signature of a decedent is sufficient to go to the jury, when it appears that the witness had been intimately acquainted with the deceased for a period of forty years, a part of the time in partnership, that their business relations were extensive and frequent, and that he had often seen the deceased sign his name, and was as familiar with the handwriting of deceased as with his own, and had no doubt that the signature in evidence was that of deceased.—*Poncin v. Furth*..... 201
4. *Same—Opinion Evidence.* A witness is competent to testify to his opinion as to the genuineness of handwriting, after showing knowledge of the handwriting, founded on adequate means of knowledge, there being no precise standard fixing the degree of knowledge necessary.—*Id.*... 201
5. *Presumption from Mailing of Letter—Rebuttal.* The presumption that a letter duly mailed has reached its destination will have but little weight against positive testimony to the effect that it was never received.—*Ault v. Interstate Saving and Loan Ass'n*..... 627

See BUILDING AND LOAN ASSOCIATIONS, 1; CARRIERS, 6; CONVERSION, 2; CRIMINAL LAW, 2; FIXTURES; FRAUD 3, 4; HOMICIDE, 5, 6, 10, 14; HUSBAND AND WIFE, 11; INSURANCE, 2; LARCENY; LIBEL AND SLANDER, 7; LOGS AND LOGGING, 2; NEGOTIABLE INSTRUMENTS, 1; PLEADING, 9, 14, 16; PRINCIPAL AND SURETY, 1; TRESPASS.

EXECUTION.

1. *Levy and Sale—Individual Interest in Partnership Property.* Under Code Proc., § 802, providing that when a defendant owns personal property jointly or in copartnership with any other person, and the interest cannot be separately attached, the sheriff shall take possession of the property, unless bond be given, and shall proceed to sell the interest

EXECUTION—CONTINUED.

- of defendant, the sheriff, or, in proceedings in a justice's court, the constable, is authorized to levy execution upon partnership property to satisfy a judgment against an individual partner.—*Graden v. Turner*. 136
2. *Property Subject—Abstract Books.* Under Code Proc., § 479, providing that "all property, real and personal, of the judgment debtor, not exempt by law, shall be liable to execution," a set of abstract books are subject to sale on execution.—*Washington Bank v. Fidelity Abstract & Security Co.* 487
3. *Attachment and Execution—Levy—Priorities.* The prior levy by a deputy sheriff of a writ of attachment placed in his hands subsequent to the placing of an execution in the hands of the sheriff, will give the attachment lien priority over the execution.—*R. Wallace & Sons' Mfg. Co. v. Sharick*, 648
- See HUSBAND AND WIFE, 4, 6; JUDGMENT, 12, 13; MECHANICS' LIENS, 1, 2.

EXECUTORS AND ADMINISTRATORS.

1. *Interest of Minor Heirs in Community Estate—Sale Without Order of Court.* A sale by a father of his minor children's portion of a community estate inherited from their deceased mother, when not made under order of the probate court, cannot, in an action against the children by the grantees to quiet title, be treated as having been made for the benefit of the heirs and as subject to confirmation in such action, on the theory of necessity for such sale, even though the grantees had in good faith purchased and improved the property, as the children would not be estopped by any dishonest conduct on the part of their father in making the sale.—*Bjmerland v. Eley*. 101
2. *Action on Decedent's Note—Presumption as to Consideration.* The rule that a valuable consideration for a note is presumed from the proof of due execution and the production of the note by a plaintiff, applies alike in actions against the maker while alive, and in actions against his administrators upon the rejected claim founded upon such note.—*Poncin v. Furth*. 201
3. *Trustees of Decedent's Estate—Probate Jurisdiction.* Where trustees of the property of an estate, instead of executors, have been appointed by a will, the probate court has no jurisdiction of questions involving their management of the estate, but the same are triable in equity.—*Smith v. Smith*. 239

EXECUTORS AND ADMINISTRATORS—CONTINUED.

4. *Same—Construction of Will.* A will devising and bequeathing to certain persons all the testator's property, "in trust, nevertheless, to and for the following uses and purposes," etc., constitutes such persons trustees, though they may be denominated in the will as executors, especially when it appears from the will construed as an entirety, that such was the intent of the testator, inasmuch as a non-resident is named as one of the executors and certain trust property of the testator is included in the devise.—*Id.* 239
5. *Presentment of Claims Against Estate.* The failure to present a claim to the trustees of a testator's estate within one year after their appointment and qualification under the will is no bar to an action on the claim when no notice to present claims has ever been published by the trustees.—*Donnerberg v. Oppenheimer* 290
6. *Same.* Where it has been stipulated between parties to an action that prior to its commencement plaintiff had duly presented the note in issue to defendants and demanded payment of them, as the personal representatives of certain decedents who had guaranteed its payment, no question can be raised on the trial as to the want of an affidavit of the justness of the claim.—*Id.* 290
7. *Failure to Present Claim Against Estate.* Failure to present a claim to the executors of one joint debtor will not release the other joint debtor, in cases where the law excuses, or does not require, presentment to the executors.—*Megrath v. Gilmore* 558
8. *Distribution of Decedent's Estate—Power of Court to Charge With Liens.* A court exercising probate jurisdiction has no power to direct a distribution of a decedent's estate to the heirs, charged with a lien in favor of the administrator on account of money expended by him or the benefit of the estate.—*Huston v. Becker.* 586
9. *Liability for Money Deposited in Bank.* An executor, who in good faith deposits funds of the estate in a bank at the time solvent and of good repute, is not liable for depreciation of the trust funds resulting from the subsequent failure of the bank, if the deposit is made to the credit of the estate, and not in the executor's individual name.—*In re Kohler's Estate.* 613

See ESTOPPEL, 1, 2; JUDGMENT, 11; PARTIES; STATUTES,
5; SURVIVAL OF ACTIONS, 2; WILLS, 2.

FIXTURES.

Intention of Party Affixing—Evidence of. The intention to make machinery a permanent part of the building to which it is attached cannot be proved by testimony as to the actual state of mind of the person attaching it to the real estate at the time of its annexation, but must be gathered from circumstances surrounding the transaction, and from what was said and done at the time.—*Washington National Bank v. Smith* 160

FRAUD.

1. *What Constitutes—Allegations of Complaint.* A complaint charging that the owner of land, in order to effect a sale thereof to plaintiff, had conspired with another for the purpose of defrauding plaintiff by agreeing that the co-conspirator should represent and pretend to plaintiff that the purchase price of such land was more than the price actually placed thereon between the conspirators, does not state a cause of action against such land owner, when it does not show that he derived any benefit from such misrepresentation, nor that he said or did anything to lead plaintiff to enter into the contract.—*Kennah v. Huston*..... 278
2. *Sufficiency of Evidence.* When fraud is alleged it must have more conclusive proof to warrant the entry of a judgment than mere inferences springing from one or two suspicious circumstances, especially when these had transpired so long before the trial as to make the incidents connected with them difficult of proof.—*Kleeb v. Frazer*..... 517
3. *Same.* In an action to recover a sum of money, which plaintiff had been induced to pay for the purchase of a mine in reliance upon false representations of the defendants, evidence is admissible showing that the defendants had made representations to other parties than plaintiff, and to the people in the vicinity generally, regarding the existence and character of the mine and the value of its ores, such representations being part of one continuous scheme or transaction for the purpose of selling the mine to any one that could be induced to buy.—*Oudin v. Crossman*..... 519
4. *Same.* A judgment for plaintiff, in an action to recover money paid for the purchase of a mine, will not be disturbed when there is evidence tending to show that the mine in fact had no existence, the location being invalid, and that the ore exhibited as a sample did not come from the mine at all.—*Id* 519

See ACCOUNT; CANCELLATION OF INSTRUMENTS, 2; HUSBAND AND WIFE, 7; PLEADING, 18.

FRAUDS, STATUTE OF.

Sale of Lands—Sufficiency of Written Memoranda. An agreement made by husband and wife with a vendor through the medium of letters and telegrams, whereby they agree to take certain land, directing that the deed be made to the wife, and the deed was made accordingly and possession of the premises taken by the wife, is sufficient to show a valid contract of purchase as against the statute of frauds.—*Underwood v. Stack*..... 407

FRAUDULENT CONVEYANCES.

1. *Bona Fide Purchaser.* The filing of a writ of attachment against the husband will not affect the rights of a subsequent purchaser from the wife of lands standing in her name, although such lands may have theretofore been conveyed by the husband to the wife in fraud of creditors, when such subsequent purchaser has no knowledge of the fraud, and no actual notice that the attachment lien was sought to be impressed upon the lands in the wife's name.—*Clerf v. Montgomery*..... 483
2. *Chattel Mortgages—Fraud as to Creditors—In Pari Delicto.* In an action to foreclose a chattel mortgage given without consideration and for the purpose of hindering and defrauding creditors, the court is warranted in finding that the parties are not *in pari delicto*, and that the mortgagor is entitled to a cancellation of the mortgage, when it appears that the parties were brothers born in Norway, that the mortgagee had resided in this country a great many years, was well educated, understood the English language and had had large experience in business affairs; that the mortgagor had resided here a much shorter time, had an imperfect understanding of the English language and of business matters, had always relied upon his more experienced brother, and had confidence in his honesty, integrity and business ability; and that the mortgagor had been unduly influenced and imposed on by the mortgagee as to the necessity for executing such an instrument, but that no fraud had been practiced, attempted or intended against his creditors.—*Melbye v. Melbye*..... 648

See ATTACHMENT; CORPORATIONS, 5.

GARNISHMENT.

Bringing in New Parties—Process. The superior court has no authority in a garnishment proceeding to make an order
47—15 WASH.

GARNISHMENT—CONTINUED.

- directing that a person not regularly served shall be made a party defendant, although it may appear from the answer or examination of the garnishee that such person is a necessary party.—*State, ex rel. Nolte, v. Superior Court*... 500
- See JUDGMENT, 2.

HOMICIDE.

1. *Sufficiency of Information—Place of Death.* Under Laws 1891, p. 47, § 4, providing for the trial of all criminal actions in the county where the offence was committed, it is not necessary, in an information charging the commission of murder in a certain county, to also allege the place of death of the deceased, in order to give jurisdiction to the court of the county where the offence was committed.—*State v. Baldwin*..... 15
2. *Same.* Where an information charges the commission of murder in a certain county, but fails to allege where the deceased died as a result of the assault upon him, the introduction of proof showing death in the county in which the assault was made is harmless error.—*Id.*..... 15
3. *Dying Declaration—Admissibility.* The constitutional provision declaring that the accused shall have the right to meet the witnesses against him face to face, will not exclude evidence of dying declarations.—*Id.*..... 15
4. *Same.* Proof of conviction of an infamous crime may be given to affect the credibility of one making dying declarations, but cannot be urged as a ground for their exclusion.—*Id.*..... 15
5. *Same—Time Intervening Before Death.* The fact that, for some days after deceased had been shot, he had no fear of impending death, is not ground for excluding his dying declarations, when it appears that at the time they were made, his condition had grown more serious, and he had been told by the doctor he was about to die, and had said that he realized it.—*Id.*..... 15
6. *Same—Manner and Form of Making.* Where a dying declaration has been made to an attorney, who afterwards, not in the presence of the deceased, reduced it to writing, but not always in the language of the deceased, even including incorrect statements in one or two minor matters, and the declaration is subsequently read to the deceased and signed by him, it is still admissible in evidence, as a question for the jury to pass upon.—*Id.*..... 15

GARNISHMENT—CONTINUED.

7. *Self-Defense—Instructions—Construction as a Whole.* The fact that the court charges the jury in one place in its instructions that the defendant claims the homicide was in self-defense on the part of defendant, "to prevent death to himself or serious bodily injury," is not prejudicial when other parts of the instructions make it clear that the defendant had the right to act upon apparent, as distinguished from actual, danger.—*State v. Carter*..... 121
8. *Same.* Where the court in the course of a charge to the jury states plainly and emphatically that the defendant might invoke the law of self-defense to protect his life or person from great "bodily harm," it is not prejudicial error to also charge that "there can be no successful setting up of self-defense by a defendant unless . . . to save his own life or his person from dreadful harm or severe calamity."—*Id*..... 121
9. *Same.* While an instruction, in a case of homicide, may be so inapt as to imply that it was the duty of defendant to have retreated when assaulted, unless it would have been more hazardous to have done so, it can not be held prejudicial when the jury are also charged "that a person being where he had a right to be and without fault is violently assaulted, may, without retreating, repel force by force."—*Id*..... 121
40. *Pleading and Proof—Variance.* Where the information in a prosecution for murder charges that the homicide was committed by means of striking and beating the deceased with "a heavy blunt instrument; a more particular description of which is to the prosecuting attorney unknown," the introduction in evidence of a broken oar, which had been found in the possession of the defendant, is not objectionable on the ground of variance, when it is not established on the trial what instrument it was that caused the death, other than that it was a heavy blunt one, and it is not shown that a description of the instrument was known by the prosecuting attorney at the time of filing the information.—*State v. Carey* 549
41. *Instructions—When Refusal of Request Harmless.* The refusal of the Court to instruct the jury as requested, upon defendant's theory of the case that death had been occasioned by a severe fall and not by the means charged in the information, is not erroneous, when the subject matter is covered by the general charge that, if it is possible to account for the death of the deceased upon any reasonable

GARNISHMENT—CONTINUED.

hypothesis other than that of the guilt of the defendant, it is their duty to do so and find the defendant not guilty, and by the further charge that, if the jury entertain any reasonable doubt upon any single fact or element necessary to constitute the offense, it is their duty to acquit him.—*Id.*... 459

12. *Same—Comment on Interest of Defendant.* An instruction by the court in a murder case, charging the jury that "in the case of the defendant you have the right to consider the great interest he has in the result of your verdict," it is not objectionable on the ground of being a judicial comment upon the evidence.—*Id.*... 549
13. *Murder in First Degree—Question of Intoxication.* Where the court has correctly instructed the jury as to how intoxication should be regarded by them in determining the degree of defendant's guilt, in the event that they should find that he was intoxicated at the time of the commission of the offence, as claimed by the defense, a verdict of murder in the first degree is not erroneous, when there is evidence tending to support it.—*Id.*... 549
14. *Same—Sufficiency of Evidence.* A verdict of murder in the first degree is warranted, when there is evidence showing that defendant, who was living with an Indian woman, prompted by jealous motives had rudely assaulted her on the day of her murder, by striking her in the face and body with his clenched fist; that he had declared to another person that he would do her up that night; that about midnight a boat was seen out in Elliott bay going in the direction of Duwamish river, in which were two persons, one beating the other with some instrument, the sound of blows and groans being audible; that the defendant and deceased had been spending the day in Seattle and had started for their home at the mouth of the Duwamish river at about eight o'clock in the evening, and that defendant had stopped at about eleven that night at a saloon on the waterfront between the place he had been visiting in Seattle and his home; that after arriving home he called at a neighbor's and asked if he had seen anything of the deceased, claiming that she was to have come home by means of a street car; that about a day and a half later he asked this neighbor to help bury his wife, as she was dead; that such neighbor declined to assist and informed the officers, who arrested defendant; that defendant remarked several times that he wished he had killed the neighbor instead of the woman; that the woman was found sunk in the water near de-

GARNISHMENT—CONTINUED.

fendant's float house with a rope attaching the body to the float; and that an autopsy showed that death had resulted from concussion of the brain produced by blows upon the head from some blunt instrument.—*Id.*..... 549

HUSBAND AND WIFE.

1. *Action by Husband to Recover Property Awarded Wife on Divorce—Damages.* Where the wife has sold community personal property before the entry of a decree of divorce awarding it to her, and the husband has begun an action to recover same pending the divorce proceedings, he is merely entitled to a judgment for the costs of his action and for damages for detention of the property, when the decree in the divorce proceedings awards the property to the wife.—*Carney v. Simpson*..... 227
2. *Community Property—Liability for Husband's Debts—Intervention by Wife to Protect.* In an action against the husband on his promissory note, the wife has a right to intervene, for the purpose of having any judgment that may be rendered against the husband adjudge that the debt was not a community debt and that it should not be satisfied out of the community real property.—*Gund v. Parke*..... 393
3. *Same—Liability on Negotiable Instruments.* A promissory note made to evidence a debt which is not for the benefit of the community cannot be collected out of community real estate, although the note may have passed into the hands of a *bona fide* purchaser for value before maturity.—*Id.*.... 393
4. *Same.* A judgment against a husband on account of his separate indebtedness is enforceable against the community personal property.—*Id.*..... 393
5. *Liability of Community Property for Suretyship Debts.* The property of the community is liable for an obligation of suretyship incurred by the husband in behalf of a corporation in which he is an officer and stock holder, in order to protect the property and business of the corporation, when, under all the circumstances of his relations with the corporation, it is to be presumed that he was acting for the community, and that any benefits which might have grown out of his connection with such corporation would have belonged to the community.—*Horton v. Donohoe Kelly Banking Co.*..... 399

HUSBAND AND WIFE—CONTINUED.

6. *Same—Levy on Husband's Interest.* Where community property stands in the name of the husband, a levy upon all of his interest in the property, upon a judgment which could be enforced against the community, would authorize a sale of the property standing in his name for the benefit of the community.—*Id.* 399
7. *Action Against for Fraud—Liability of Community Property.* A judgment against husband and wife is warranted in an action to recover money which plaintiff was induced to pay for certain property upon the false representations of the husband, when title to the property was in the wife's name and the consideration therefor was community property.—*Oudin v. Crossman* 519
8. *Community Liability—Release of Wife by Extension Secured by Husband.* Where a husband and wife are liable upon a promissory note executed by them evidencing a community indebtedness, the wife cannot escape liability from the fact that an extension of the time of payment of the note was secured by the husband for a valuable consideration, without her knowledge or consent.—*McKee v. Whitworth* 536
9. *Gift by Husband to Wife of Community Land—Liability for Community Debts.* Where land has been conveyed by a husband to his wife by a deed reciting that the land is "to be held to her separate use," such land, when the transfer has not been made in fraud of creditors, becomes the separate property of the wife, and is not liable for community debts, which have not been contracted for expenses of the family or for the education of the children.—*Goodfellow v. LeMay*. 684
10. *Same.* The fact that the wife was not present at the time of the execution of a deed of lands to her by her husband and was not consulted in regard thereto, would not affect its character as vesting a separate title in her, where she has accepted the deed, and it has not been made in fraud of existing creditors.—*Id.* 684
11. *Same—Varying Deed by Parol Evidence.* The recital in a deed by a husband to his wife that the lands conveyed were "to be held to her separate use," thus in effect constituting a gift to her, cannot be affected by the parol testimony of the husband that his purpose was to make provision for her and the family against possible reverses.—*Id.* 684

SEE FRAUDULENT CONVEYANCES, 1.

INDICTMENT AND INFORMATION.

1. *Indorsement of Witnesses.* The indorsement of the name of an additional witness upon the information after the beginning of the trial, only entitles the defense to a continuance, and is not ground of error when a continuance for that reason is not applied for.—*State v. Holedger*..... 443
2. *Duplicity.* An information against defendant for the crime of rape committed upon a female child under the age of twelve years, sufficiently charges one crime, and not two, when it alleges that the defendant "feloniously did make an assault, and her the said [child] then and there feloniously did ravish, carnally know and abuse," etc., since the words charging assault must be construed as charging same only as included in the crime of rape.—*State v. Elswood*..... 453
 See COURTS, 2; EMBEZZLEMENT, 1; LIBEL AND SLANDER, 2; OBSCENITY.

INJUNCTION.

1. *Dissolution—Continuance of Contract Rights by Decree.* Where defendants have been improperly restrained from performing certain acts under a contract, which was to be terminated at a certain time, the court may properly, in refusing to continue the injunction, grant defendants such further time after the period for which their contract rights had been given as would be equivalent to what they had lost by the interference of the plaintiff in securing a restraining order.—*Davis v. Ford*..... 107
2. *Order Granting Injunction—Effect of Appeal.* An order granting a temporary injunction cannot be suspended by an appeal therefrom, as the statutory provisions authorizing the filing of a supersedeas bond (Laws 1893, p. 119, §§ 6, 7) have no application to orders granting injunctive relief.—*State, ex rel. Commercial, etc., Power Co., v. Stallcup*..... 263

INSOLVENCY. See ASSIGNMENT FOR BENEFIT OF CREDITORS; CORPORATIONS, 2-8.

INSTRUCTIONS. See APPEAL, 9, 10, 14, 28; CRIMINAL LAW, 1, 3, 5, 6, 12; DAMAGES, 3; EMBEZZLEMENT, 2; HOMICIDE, 7-9, 11-13; LIBEL AND SLANDER, 1; TRIAL, 3, 5, 8, 10, 11, 15.

INSURANCE.

1. *Insurance of Property by Mortgagee—Right to Proceeds.* Where insurance has been effected upon mortgaged prem-

INSURANCE—CONTINUED.

ises by the mortgagee, it must be presumed, in the absence of any communication of a contrary intent to the mortgagors, that it was so done in pursuance of a right reserved in the mortgage providing that the mortgagee might keep the property insured at the expense of the mortgagors, and that moneys paid for premiums should be a lien upon the mortgaged property and collected under the terms of the mortgage.—*Washington National Bank v. Smith*..... 160

2. *Same*. Where policies of insurance upon mortgaged property are taken out by a mortgagee in the name of the mortgagors, with a provision that the loss, if any, should be payable to the mortgagee as her interest might appear, the mortgagee cannot show by oral testimony that the contracts were not made by her as mortgagee but that the policies were taken out for her sole benefit and that the premiums paid were not intended to be charged against the mortgagors under the conditions of the mortgage authorizing her to insure, if the mortgagors failed to do so.—*Id.*..... 160

INTERPLEADER.

Sufficiency of Complaint—Garnishment. A complaint in an action of interpleader is sufficient, especially when first objected to after judgment, when it alleges that plaintiff was indebted to a certain firm, that it had been garnished by two creditors of said firm, one of whom had obtained a judgment against plaintiff, but that the other garnishing claimant is assailing such judgment as void, that plaintiff is willing to pay the money due the principal debtor to the party entitled thereto and offers to pay said money into court to be applied as the court shall determine.—*Mosher v. Bruhn* 332

INTERVENTION. See HUSBAND AND WIFE, 2.

JUDGE. See COURTS, 1; STATUTES, 6, 7; TRIAL, 16.

JUDGMENT.

1. *Action to Determine Priority of Liens—Pleading.* In an action to have a deficiency judgment adjudged as a prior lien on other realty of the mortgagee defendants, upon which an unsecured creditor had obtained a judgment lien, the complaint is demurrable when it fails to state that the mortgagee defendants were insolvent, or that any execution had been issued against them for the deficiency upon the mortgage foreclosure judgment and returned unsatisfied.—*Howard v. Devo*..... 270

JUDGMENT—CONTINUED.

2. *Judgment in Garnishment—Res Judicata—Province of Jury.* In a suit upon a promissory note by the endorsee, in which the maker sets up the defense that the same had been paid in garnishment proceedings as a debt due the original payee, the action of the court in discharging the jury and finding for defendant is unwarranted, when there is conflicting evidence as to whether or not the endorsee had appeared in the garnishment proceedings.—*Wolverton v. Glasscock*..... 279
3. *Judgment of Ouster—Effect of Appeal.* The filing of a supersedeas bond under Laws 1893, p. 123, § 7, has the effect only of staying proceedings on the judgment, but does not operate to suspend or destroy the force and effect of the judgment itself.—*Fawcett v. Superior Court*..... 342
4. *Conclusions of.* A valid judgment for plaintiff finally negatives every defense that might and should have been raised against the action, for the purpose of every subsequent suit between the same parties or their privies in reference to the same subject matter.—*Isensee v. Austin*..... 352
5. *Res Judicata—Effect on Defenses that Might Have Been Interposed.* The assignees of a contract are barred by the rule of *res judicata* from maintaining a suit to be subrogated to the rights of the mortgagee in a certain mortgage, which they had agreed to pay in part consideration of their contract, by reason of over payments on such contract, when judgment has already been obtained against their assignors canceling the contract for non-performance, and such rights as the assignees now claim would have been available as a defense by their assignors in the former action.—*Id*..... 352
6. *Same—Parties.* In a suit upon a contractor's bond the defense of *res judicata* cannot be set up by reason of the fact that in a prior action one of the sureties had recovered judgment against the obligee for moneys advanced to pay laborers upon the obligee's promise to refund.—*DeMattos v. Jordan*..... 378
7. *Same.* The plea of *res judicata* is not available as a defense where the parties to the action are not the same as in the one in which the judgment sought to be set up was rendered.—*Id*..... 378
8. *By Default—Waiver.* The entry of a default against a defendant is waived by allowing him to participate in the subsequent proceedings in the cause, to serve and be served with motions, and by otherwise treating him as a party thereto.—*Cornell University v. Denny Hotel Co* .. 433

JUDGMENT—CONTINUED.

9. *Vacation of Judgment—Limitation on Action by Minor.* An action for the vacation of a judgment against a minor is barred if not brought within a year after the arrival of such minor at the age of majority.—*Hill v. Lowman*. 503
10. *Same—Sufficiency of Complaint.* A complaint in an action to vacate a judgment of foreclosure is insufficient, when there is no showing that it was not an equitable one, or that the judgment would be different if the cause were retried.—*Id.* 503
11. *Judgment Against Executor—Effect on Devisees.* A decree of foreclosure against the executor of an estate is binding on devisees, although not parties to the action.—*Id.* 503
12. *Vacation of Judgment—Effect as Between the Parties—Sale of Property Under.* Where a judgment has been vacated because of the irregularity of the plaintiff in obtaining it, it operates to avoid an execution sale made under it, as between the parties, and cancels the purchase by the execution plaintiff of the property sold.—*Benney v. Clein* 581
13. *Same—Innocent Purchaser.* An execution plaintiff who purchases the property levied on does not occupy the position either of an innocent purchaser or of a *bona fide* incumbrancer.—*Id.* 581

See APPEAL, 1; CORPORATIONS, 5, 9; QUO WARRANTO, 4-6.

JURISDICTION. See APPEAL, 13; COURTS, 2; PROHIBITION, WRIT OF, 3.

JURY.

1. *Peremptory Challenges—Waiver.* Under the provisions of Code Proc., §348, governing peremptory challenges, the defendant cannot proffer a peremptory challenge to a juror on the panel, when the jury has been passed for cause and the defendant has failed to peremptorily challenge such juror until after several talesmen have been called and examined in place of jurors excused at the peremptory challenge of the plaintiff, as the right of challenge must be exercised alternately by the adverse parties.—*Poncin v. Furth*. 201
2. *Qualifications of Jurors—Householders.* Laws 1895, p. 139, providing that county commissioners shall select as jurors such only as are householders is not in violation of art. 1, §21, of the constitution, which provides that the right of trial by jury shall remain inviolate.—*State v. Holedger*. . . . 443

JURY—CONTINUED.

3. *Competency—Examination.* In the examination of a juror upon the *voir dire* it is improper to ask him whether he would attach more importance or credibility to the testimony of a minister than to that of any one else.—*Id.* 443
4. *Same—Bias—Challenge.* Error in overruling a challenge for actual bias interposed to a juror is without prejudice, when the juror is subsequently excluded upon the peremptory challenge of the adverse party.—*State v. Carey.* 549
5. *Same.* Where the examination of a juror shows that no fixed or definite opinion exists in his mind relative to the merits of a criminal prosecution, but only a vague or merely floating impression based upon a newspaper report of the case, or heard at about the time of the commission of the supposed crime, the juror is not subject to a challenge on the ground of bias.—*Id.* 549

See CONSTITUTIONAL LAW, 7; TRIAL, 12.

JUSTICE OF THE PEACE. See CONSTITUTIONAL LAW, 1;
COURTS, 2; STATUTES, 4.

LAOCHES. See EQUITY, 1, 2; MANDAMUS, 1.

LARCENY.

Admissibility of Evidence—Identity of Property Stolen. In a prosecution for cattle stealing it is competent for a witness, in testifying as to the identity of the animal alleged to have been stolen, to state that it was such animal "to the best of his judgment and belief," as the question of the force to be given to his testimony is for the jury.—*State v. Murphy.* 98

LIBEL AND SLANDER.

1. *Criminal Prosecution—Instructions.* In a prosecution for criminal libel it is not error for the court to charge the jury that "the publisher of a libel is presumed to intend what the publication is likely to produce," although §17 of the Penal Code, defining libel, may omit any reference to the matter of malice or intention constituting an element of the crime. *State v. Nichols.* 1
2. *Same—Indictment.* An indictment for criminal libel, which sets forth the libelous article and charges defendant with "thereby intending to provoke [the person libeled] to wrath,

LIBEL AND SLANDER—CONTINUED.

- and expose him to public hatred, contempt and ridicule and deprive him of the benefits of public confidence and social intercourse," is sufficient, although the statute defines libel as "the defamation of a person . . . tending to provoke him to wrath, or expose him to public hatred," etc.—*State v. Nichols*..... 1
3. *Question of Law for Court.* In civil actions, the question whether a publication constitutes libel is one of law to be determined by the court, where the language is unambiguous.—*Urban v. Helmick*..... 155
4. *Same—Construction.* In determining whether the language is libelous, it must be given its ordinary meaning, and the meaning cannot be extended by innuendo beyond what the words justify in connection with the extrinsic facts.—*Id.* 155
5. *Matter Libelous Per Se.* It is not libelous *per se* to accuse some one of being deficient in some quality which the law does not require him as a good citizen to possess.—*Id.* 155
6. *Same.* A publication charging a hotel proprietor with being a "hog" for the reason that he would not trade at home and build up the home trade and town as much as possible, but sent to another city for supplies, because he wanted to make it all, is not libelous *per se*.—*Id.* 155
7. *Evidence of Good Character.* In an action for libel, plaintiff is not entitled to prove his general good reputation, when defendants, in order to sustain their plea of justification, have put in evidence specific instances of misconduct on the part of plaintiff.—*Hall v. Elgin Dairy Co.*..... 542
8. *Right to Open and Close.* In an action for libel, when the publication has been admitted by defendants and a defense of justification set up, the burden of proof is on defendants and they are entitled to open and close the case to the jury. *Id.*..... 542
9. *Justification—Evidence.* Where the basis of an action for libel is the publication of a circular by defendants charging that plaintiff as a former employee had admitted the misappropriation of money belonging to defendants, in order to establish their plea of justification defendants are only required to prove such confession, and are not required to go further and prove that plaintiff had actually misappropriated their money.—*Id.*..... 542

LICENSE. See ESTOPPEL, 2, 3.

LIENS. See EQUITY, 3, 4; EXECUTION, 3; EXECUTORS AND ADMINISTRATORS, 8

LIMITATION OF ACTIONS.

Foreclosure of Street Assessments. An action to foreclose a street assessment, not brought by the city within two years of its delinquency, is barred by the statute of limitations.

—*Ballard v. West Coast Improvement Co.*..... 572

SEE JUDGMENT, 9; MUNICIPAL CORPORATIONS, 18.

LOGS AND LOGGING.

1. *Enforcement of Logger's Lien—Pleading.* The complaint in an action to foreclose a logger's lien is not demurrable on the ground that it does not allege, except as a conclusion of law, that anything was due the plaintiff, when it states that "under the terms and conditions of the said contract defendants became indebted to the plaintiff in the sum of three hundred three and 87-100 dollars."—*Mason v. McGee.* 272
2. *Record of Lien Notice—Evidence* The fact that notice of a logger's lien was duly recorded is sufficiently proved by the introduction in evidence of the original notice with the auditor's certificate of record thereon and by testimony admitted without objection, that plaintiff had filed the notice for record in the proper auditor's office.—*Id.*..... 272

MANDAMUS.

1. *Application for Writ—Laches.* A writ of mandate to compel a superior court to entertain an appeal from a justice of the peace will not issue, where application for relief by mandamus was not made until after a lapse of four months from the date the ruling complained of was made.—*State, ex rel. Brown, v. Superior Court.*..... 314
2. *Alternative Writ—Recital of Facts.* In an application for a writ of mandate, it is necessary under Laws 1895, p. 117, §16 *et seq.*, that the facts relied upon as ground of relief should be set out either in the alternative writ or in a petition served therewith and referred to therein.—*State, ex rel. Wolf, v. Moore.*..... 432

MASTER AND SERVANT.

1. *Who is Vice-Principal.* A foreman in charge of railway construction work, with authority to employ and discharge workmen and direct them in the performance of their work, and who is the sole representative of the com-

MASTER AND SERVANT—CONTINUED.

- pany at the place or within miles thereof, stands in the position of a vice principal, although it may be the duty of such foreman to receive orders from, and report to, the road-master, whose headquarters were at a considerable distance from the place of work.—*McDonough v. Great Northern Ry Co.*..... 244
2. *Duty of Master to Servant.* The master owes a positive duty to an employee, not only to provide him with a reasonably safe place in which to work, so far as the nature of the work undertaken and the exigencies of the case will permit the same to be made reasonably safe, but also to observe such care as will not expose the employee to perils and dangers which may be guarded against by reasonable care and diligence; and where the performance of this positive duty is by the master entrusted to another, his failure to perform is the failure of the master.—*Id.*..... 244

MECHANICS' LIENS.

1. *Exemption of Material Furnished From Judgment Liens Against Owner.* The fact that a material man, who has furnished building material to a contractor, has filed notice of lien against the owner of the building in which it is to be used, will not, when the lien claim has not been paid, vest the title to such material in the owner of the building so as to render it liable to execution on judgments against him.—*Potvin v. Wickersham.*..... 646
2. *Same.* Under Gen. Stat., § 1675, exempting from execution material designed in good faith to be used in the construction of a building, such material will be exempt, although the completion of the building has been delayed for a number of years pending litigation, and whether the material is to be used by the one engaged in the construction of the building at the time of its purchase or by one succeeding to his rights.—*Id.*..... 646

MORTGAGES.

1. *Foreclosure—Necessary Parties.* One whose title is adverse to and paramount to the mortgagor is not a necessary nor proper party to a foreclosure of the mortgage.—*Murdoch v. Leonard.*..... 142
2. *Foreclosure Sale—Surplus.* Where the sheriff upon making a foreclosure sale has been paid by the bidder, who was the plaintiff in the action, a certain sum as commission,

MORTGAGES—CONTINUED.

such sum constitutes a surplus in the hands of the sheriff, which it is his duty to pay over to the judgment debtor.—*Soderberg v. King County*..... 194

3. *Record—Index—Sufficiency.* An index to a record of mortgages which contains the name of mortgagor and mortgagee and a description of the land to the extent that it gives, under three columns, headed respectively "Sec. Lot," "Twp. Block" and "R," the figures "35," "7," and "36" respectively, is sufficient to constitute constructive notice of an incumbrance upon sec. 35, twp. 7, range 36 in the county of the place of record, under the provisions of the law requiring records of deeds and mortgages to be properly indexed in order to constitute constructive notice.—*Malbon v. Grow*..... 301
4. *Foreclosure by Assignee—Sufficiency of Title—Estoppel.* Where an assignment of a mortgage held by a mortgage company has been executed by one of its vice-presidents, under the seal of the corporation, and it is shown that it had been the custom of this officer for a considerable period of time prior thereto, to assign like securities, the corporation is estopped to afterwards question his authority in that respect.—*Atlantic Trust Co. v. Behrends*..... 466
5. *Same.* If an assignment of a mortgage is sufficient to estop the mortgagee from disputing it, the mortgagor cannot raise any question as to the validity of the assignment in an action of foreclosure instituted by the assignee.—*Id.* 466
6. *Mortgage Foreclosure—Sufficiency of Evidence.* A finding by the court in a foreclosure proceeding that a mortgage had become due prior to the date of its maturity is warranted, when the mortgage provides that the mortgagee has an option to declare the whole sum due for failure to pay any installment of interest, and there is evidence sufficient to show such election.—*Ames v. Bigelow*..... 532
7. *Same—Attorney's Fee.* The action of the court in allowing the attorney's fee provided in a note and mortgage as payable in case of foreclosure is warranted, although there is no other proof of the value of services in such proceedings than the agreement contained in the instruments sued upon, which had been introduced in evidence.—*Id.*..... 532
8. *Leave to Mortgagee to Sue Pending Insolvency Proceedings—Discretion of Court.* Although an assignment for the benefit of creditors has been made by a mortgagor, it is a matter

MORTGAGES—CONTINUED.

within the discretion of the court, to grant leave to the mortgagee to institute a separate suit for foreclosure.—
Penn Mutual Life Ins. Co. v. Fife..... 605

9. *Same*—*Collateral Attack*. The action of the court in assignment proceedings in granting leave to a mortgagee of the assignor to bring a separate suit for foreclosure cannot be collaterally attacked in the foreclosure proceeding.—
Id...... 605

See ASSUMPSIT, 1; INSURANCE, 1, 2; JUDGMENT, 1;
 SHERIFFS AND CONSTABLES; SUBROGATION.

MUNICIPAL CORPORATIONS.

1. *Street Improvements—Estoppel of Property Owner*. Although the resolution of the city council authorizing a street improvement, and the notice given thereof, may be illegal, a property owner is estopped from raising objection thereto, when, subsequent to such resolution and notice, he had executed a release of damages and signed the petition for the proposed improvement and requested the city to go on with the work and assess his property.—
Tacoma Land Co. v. Tacoma.... 183
2. *Power to Purchase Land at Tax Sale*. The city of Whatcom had power to purchase land at a sale for delinquent street improvement assessments, under the provisions of its charter (Laws 1883, p. 150) which authorizes a purchase by the city treasurer for the city of such town lots and lands as cannot be sold for the amount of taxes, interest and charges thereon, when offered for public sale.—*Potter v. Black* 186
3. *Power to Declare Assessments Delinquent*. Under the provisions of the charter of the city of Whatcom (Laws 1885-6, p. 430, §§9, 10), providing that after the council shall have approved of an assessment for a street improvement, "they shall by ordinance establish the same and require the payment of said assessment within thirty days," and that upon complaint of any person aggrieved, within thirty days from the first publication of notice of the assessment, the council may amend same as to them may seem just, the action of the council in granting a rebate of a portion of such assessment more than three months subsequent to the passage of an ordinance establishing the assessment is unwarranted, though the council may not by resolution have declared the assessment delinquent until after such attempted rebate.—*Id.*..... 186

MUNICIPAL CORPORATIONS—CONTINUED.

4. *Payment of Warrants.* The treasurer of a city may be required to pay moneys in the treasury in a special fund upon warrants drawn thereon, although there may not be enough money therein to pay the face of the warrant, with the interest thereon.—*Id.*..... 186
5. *Same.* The act of March 21, 1895 (Laws, p. 379), providing that the treasurer of a city shall issue a call for warrants whenever he has \$500 on hand, except in cases where the oldest outstanding warrant, with interest, exceeds the sum of \$500, in which case he shall wait until funds sufficient accumulate, does not apply to warrants drawn against a special fund, which fund cannot be devoted to any other purpose.—*Id.*..... 186
6. *Consolidated Cities—Liability for Debts of Former Corporations.* Where a consolidation of two cities has been effected under the provisions of Gen. Stat., §§ 497, 502, such consolidated city may be required to set apart from its current revenues a sufficient amount to liquidate certain warrants issued against a particular fund of one of the former corporations.—*Id.*..... 186
7. *Power to Discount Its Warrants.* A municipal corporation cannot enter into a contract to discount its own warrants, and, in pursuance thereof, deliver in payment of the purchase price of land, warrants whose face value is in a larger sum than the purchase price agreed upon.—*Million v. Soule*, 261
8. *Notice of Street Assessment—Sufficiency.* Personal notice to a property owner affected by a proposed levy of assessments for a street improvement is sufficient, even where the statute provides for publication of notice in an official newspaper.—*Town of Tumwater v. Pix* 324
9. *Same.* Where a municipality of the fourth class proposes to levy an assessment for a street improvement under Laws 1893, p. 226, which requires notice thereof to be published in the official newspaper of the corporation for ten days, but the town is not authorized by law to designate an official newspaper, the requirements of the statute as to notice will be satisfied by personal service of notice upon the parties affected by the proposed assessment.—*Id.* 324
10. *Same—Enforcement—Pleading.* An allegation in a complaint that "notice of an assessment and of the hearing and considering of objections to the assessment roll was given defendant personally," is sufficient, as against a de-
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MUNICIPAL CORPORATIONS—CONTINUED.

- murrer, to show that actual notice was given to defendant.
—Id. 324
11. *Power to Refund Money Received from Void Tax Sales.* Where a city has power under its charter to provide for the levy and collection of taxes, it has power to authorize the repayment of moneys paid into its treasury upon void tax sales.—*Phelps v. Tacoma.* 367
12. *Same.* Such city cannot, however, pass an ordinance which would relieve those who had purchased at void tax sales before the passage of the ordinance, as such provisions, when applied to past tax sales, cannot be construed as included in the power given the city to regulate the assessment and collection of taxes.—*Id.* 367
13. *Same.* Money paid into a city treasury under a void tax sale, which the city was authorized by ordinance to refund, did not become the absolute property of the city, and its repayment would not be the incurring of a debt, within the meaning of the constitutional provision forbidding cities to incur indebtedness beyond a certain limit.—*Id.* 367
14. *Governmental Powers—Assumption of Illegal Indebtedness.* Indebtedness incurred by a void municipal organization may be assumed as a valid indebtedness by a duly organized municipal corporation subsequently incorporated within the same territory under a statute providing for the reincorporation of such towns and legalizing contracts and obligations theretofore made or entered into by such void corporations.—*State, ex rel. Traders' National Bank, v. Winter.* 407
15. *Same—Power of Legislature to Authorize.* It is competent for the legislature to direct the payment by a municipal corporation of a claim that the law does not recognize as a legal obligation, and to ratify any act which it could have authorized to be done.—*Id.* 407
16. *Same—Delegation of Power.* An ordinance providing for the surrender to, and filing with, the mayor and clerk of a town of certain warrants issued by the town under a void incorporation thereof and directing the issuance of new warrants by such officers is not a delegation to them of power belonging to the council, when the ordinance itself shows that the council had audited and allowed such warrants by expressly recognizing the validity of the claims upon which they were issued.—*Id.* 407

MUNICIPAL CORPORATIONS—CONTINUED.

17. *Contracts—Construction.* Where a municipal ordinance authorizing the purchase of a light and water system limits the property purchased to such as was owned or operated by the company as a part of its water and light plants, the city is not entitled to certain real property which belongs to the light and water company, and is used for other purposes.—*Tacoma v. Tacoma Light and Water Co.*..... 499
18. *Assessments for Street Improvements—Action by City.* Where a municipal corporation has brought an action to foreclose street assessments on the theory that they had been levied by a duly organized and existing municipality, it cannot, in order to avoid the bar of the statute of limitations to its action, assume the position that its incorporation was void at the time of the levy of the assessment, and that the statute did not begin to run against until the taking effect of a subsequent law validating the attempted incorporation which had authorized the levy.—*Ballard v. West Coast Improvement Co.* 572
19. *Validity of Ordinance—Regulation of Liquor Business.* The subject matter of an ordinance providing for the licensing of saloons is not in conflict with the subject matter of an ordinance regulating the hours during which saloons should be closed.—*Seattle v. Pearson*..... 575
20. *Same—Void in Part—Effect.* Where an ordinance consists of several and distinct parts, the fact that one of them is void will not render the whole ordinance void, if such void part can be eliminated without in any way destroying the efficacy or utility of the rest of the ordinance.—*Id.*..... 575
21. *Same—Conflict with General Law.* An ordinance fixing a minimum fine as the penalty for the commission of a misdemeanor, while the general misdemeanor law of the state fixes no minimum, is not void on that ground, as being in conflict with the general law.—*Id.*..... 575

SEE BANKS AND BANKING, 1, 2; CONSTITUTIONAL LAW,
1, 3, 4; LIMITATION OF ACTIONS.

NEGLIGENCE.

1. *Contributory Negligence.* The fact that a person in a vehicle, after having driven across a street railway track, stops his vehicle so close to the track, for the purpose of conversing with a friend, that a car cannot pass without colliding, does not necessarily constitute contributory negligence of such

NEGLIGENCE—CONTINUED.

- a character as to prevent recovery for the negligence of the railway company in causing a collision.—*Redford v. Spokane Street Railway Co.* 419
2. *Same*—*Proximate Cause*. When the defendant's negligence is the proximate cause of the injury, while that of the plaintiff is only a remote cause or a mere condition of it, the action will lie.—*Id.* 419

SEE CARRIERS, 1, 5; MASTER AND SERVANT, 2.

NEGOTIABLE INSTRUMENTS.

1. *Maker or Surety*—*Parol Evidence*. The makers of a promissory note cannot show by parol that they all signed it as sureties, especially when there is an affirmative statement in the note that the parties signed as principals.—*Wingate v. Blalock.* 44
2. *Action on*—*Attorney Fees*. In an action on a promissory note, plaintiff is entitled, under Code Proc., § 803, to judgment for an attorney's fee in any amount specially contracted for.—*Poncin v. Furth.* 201
3. *Bona Fide Purchasers*. That a promissory note was obtained after maturity without any consideration is no defense to an action thereon by the holder, when the note had been transferred before maturity to parties other than plaintiff, who were holders in good faith and for value, and plaintiffs' title had been acquired through such *bona fide* holders.—*Donnerberg v. Oppenheimer.* 290
4. *Indorsement by Guaranty*. A written guaranty upon the back of a promissory note signed by the payee and another constitutes an endorsement of the note with an enlarged liability when the note has been transferred to other parties.—*Id.* 290
5. *Action on Promissory Note*—*Pleadings*—*Allegations of Ownership*. In an action on promissory notes by an indorsee thereof, the complaint is sufficient as against general demurrer attacking an averment of ownership in plaintiff, which is alleged as follows: "That for value and before maturity, Alexander A. Munson indorsed said notes by writing across the back of each before delivery the name 'Alexander A. Munson.' That plaintiff is now the owner and holder of said notes and mortgage."—*D. M. Osborne & Co. v. Stevens.* 478

NEGOTIABLE INSTRUMENTS—CONTINUED,

6. *Action on—Sufficiency of Answer.* In an action upon a promissory note, plaintiff is not entitled to judgment on the pleadings when the answer admits the execution of the note but alleges a failure of consideration, and also that the defendant's signature was obtained by fraud.—*Port Townsend Southern Railroad Co. v. Weir*..... 507
7. *Same—Failure of Consideration—Sufficiency of Evidence.* In a suit upon a promissory note for \$250 given by defendant to plaintiff as a part of a subsidy for the construction of a railroad from the city of Port Townsend to connect with a transcontinental line of railway, in accordance with a bond for \$1,000 conditioned that, if twenty miles of road were completed by a certain date, \$250 should become due and the balance upon the completion of the road as a whole, a verdict for defendant will not be disturbed when no more than the first twenty miles had been constructed and the issue submitted to the jury was as to whether or not the note in suit was to cover a portion of the second installment instead of the first, as it must be presumed from their verdict that they found the note was given as a part of the second installment, for which there was admittedly no consideration.—*Id.*..... 507

SEE EXECUTORS AND ADMINISTRATORS, 2; HUSBAND AND WIFE, 3, 8.

NEW TRIAL. SEE APPEAL, 24, 31; DAMAGES, 4.

OBSCENITY.

1. *Indictment—Scienter.* An indictment, charging defendant with knowingly, unlawfully, maliciously, scandalously and feloniously composing, editing, printing, selling, distributing and offering for sale, etc., a certain lewd, scandalous, obscene and indecent newspaper, sufficiently charges the commission of the offense defined by §205, Pinal Code, although there is no allegation of knowledge on the part of defendant as to the character of the publication, since such knowledge must necessarily be presumed from the fact of his editing and composing the publication.—*State v. Hol-edger*..... 443
2. *Same—Description of Offense.* An indictment for publishing, editing and selling obscene and indecent literature, which charges defendant with editing, printing, selling, distributing and offering for sale and distributing a certain lewd, scandalous, obscene and indecent newspaper, is not

OBSCENITY—CONTINUED.

objectionable on the ground that it charges the commission of more than one crime, since all are but one offense, laid as committed in different ways.—*Id.*..... 443

OFFICE AND OFFICERS.

Removal for Misconduct—Appeal. The supreme court will not review the evidence in a special proceeding instituted under the provisions of Laws 1895, ch. 65, p. 114, unless settled in a statement of facts or bill of exceptions, and certified by the judge of the trial court, in accordance with Laws 1893, p. 115, §11, as contained in all the material facts.—*Taylor v. City Council of Tacoma.*..... 92

See COUNTIES, 3, 8, 9; QUO WARRANTO, 1-7.

PARTIES.

Death of Party—Substitution of Executor. Where executors have been substituted as parties defendant in a cause by stipulation, it is unnecessary to file an amended complaint showing the death of the defendant and the appointment and substitution of his executors.—*Megrath v. Gilmore.*.... 558

See GARNISHMENT; JUDGMENT, 7, 8; MORTGAGES, 1.

PARTNERSHIP.

1. *Evidence to Establish—Sufficiency.* In an action against several persons on the theory that they are co-partners in the quarrying business, which relation they deny, the general verdict of the jury against them should be set aside, when the special verdict of the jury finds such partnership as having been entered into at a certain time and place, based upon a memorandum in evidence, which has none of the elements of a contract of partnership but is a unilateral agreement whereby certain lands are leased to defendants for quarrying purposes, there being no evidence showing the presence of all the alleged partners at the time and place such agreement was found by the jury to have been entered into.—*Ottison v. Edmonds.*..... 362
2. *Action for Accounting—Decree Providing for Payment of Individual Debts.* In an action between two partners for an accounting, the court has no authority to make provision for the payment of the individual debt of one of the partners by reason of the fact that he had pledged certain personal property, which had been loaned to the partnership, to the other partner to indemnify him as surety for the payment of such individual debt.—*Jose v. Lynch.*..... 654

See EXECUTION, 1.

PAYMENT.

1. *Sufficiency of Evidence.* In an action upon a judgment, defendant's plea of payment is established by evidence that plaintiff had received from defendant's father the plaintiff's own bond for a sum which he stated in a letter to defendant was bigger than the judgment and he thought they were square, as the only logical inference therefrom could be that the bond had been accepted in payment of the judgment. —*Edmunds v. Black*..... 73
2. *Involuntary Payment—Right of Recovery.* A payment by the sheriff into the county treasury of a surplus arising from a foreclosure sale, made without the knowledge or consent of the judgment debtor, cannot be considered as a voluntary payment by the latter.—*Soderberg v. King County*. 194
3. *Voluntary Payment of Taxes.* Moneys paid for current taxes by the purchaser at a void tax sale, under the supposition that he had acquired title under such tax sale, fall under the rule that moneys voluntarily paid on account of taxes cannot be recovered.—*Phelps v. Tacoma*..... 367

PLEADING.

1. *Reply—Inconsistent Defenses.* When one portion of a reply to an affirmative defense set up in the answer which alleges a contract between the parties authorizing the acts complained of, admits such contract, another portion of the reply denying the contract, on the ground that plaintiff had no power to make it, should be stricken out on motion of the defendant therefor.—*Davis v Ford*..... 107
2. *Motion to Strike.* Error of the court in refusing to strike a reply upon defendants' motion, is cured by the action of the court in trying the case upon the theory that such reply was entirely irrelevant and immaterial.—*Id*..... 107
3. *Judgment on Pleadings.* Judgment on the pleadings is not authorized where a reply, though insufficient in law, has actually been filed to the affirmative matter in the answer. *Id* 107
4. *Bill of Particulars.* The refusal of the court, in an action for damages for failure to transport plaintiff, to require plaintiff to furnish a bill of particulars showing the respective amounts claimed for loss of time, trouble, annoyance, disappointment and anxiety of mind, is not an abuse of discretion, especially where the damages claimed are general in their nature and are not required to be specifically alleged.—*Turner v. Great Northern Ry. Co.*..... 213

PLEADING—CONTINUED.

5. *Amendment During Trial—Discretion of Court.* It is within the discretion of the court to permit the amendment of a complaint by plaintiff after the close of his testimony, and it is not an abuse of such discretion when the amendment is not of such a character as to materially change the cause of action, nor such as to occasion surprise or place opposing counsel at a disadvantage.—*McDonough v. Great Northern Ry. Co.*..... 244
6. *Departure—Waiver of Objection.* By proceeding to trial without raising the objection that the reply constitutes a departure from the cause of action set out in the complaint, the defendant waives his right to urge the objection on appeal.—*Asplund v. Mattson*..... 326
7. *Sufficiency of Complaint—Waiver of Objections.* Where the objection that the complaint does not state a cause of action has been raised in the lower court by demurrer, and the demurrer has been subsequently waived, the defendant cannot raise the objection of insufficiency of the complaint on appeal, as Code Proc., § 193, permitting the defendant to raise the objection at any stage of the proceedings that the complaint does not state a cause of action has no application to cases where the point has been once raised in the lower court by demurrer and then abandoned.—*Mosher v. Bruhn*..... 332
8. *Same—Attack After Judgment.* When a complaint is attacked after judgment for want of facts to state a cause of action, it must be most liberally construed and the judgment sustained, if by any reasonable intendment it can be.—*Id.*..... 332
9. *Variance.* In an action which seeks to charge defendant as assignee of a written lease for a term of years, plaintiff should be non-suited when there is no proof that the assignment was in writing.—*Jacobs v. First National Bank*..... 358
10. *Time for Answer—Extension.* The filing by defendant of a motion for a bill of particulars is sufficient, *ipso facto*, to extend the time for answering.—*Plummer v. Weil*..... 427
11. *Same—Amendment.* When a bill of particulars furnished by plaintiff pursuant to an order of the court is insufficient, the court has authority to order him to file a further and amended bill of particulars.—*Id.*..... 427
12. *Bill of Particulars.* In an action by an attorney to recover the value of professional service he may be required to particularize the servicer and the value of each item, and

PLEADING—CONTINUED.

- his failure to keep an account thereof cannot be set up as an excuse for not complying.—*Id.*..... 427
13. *Same—Dismissal of Action for Failure to Amend.* Under Code Proc., § 409, authorizing the dismissal of an action by the court, for disobedience of the plaintiff to an order concerning the proceedings in an action, the court is warranted in dismissing an action upon the failure of the plaintiff to comply with an order directing an amended bill of particulars to be furnished.—*Id.*..... 427
14. *Variance—Estoppel to Raise Objection.* A defendant cannot urge a variance between the contract pleaded by plaintiff and the one offered in evidence, when the judgment is based on the contract pleaded by defendant in his answer.—*Megrath v. Gilmore* 558
15. *Duplicity.* Where a complaint sets forth facts tending to show a liability both in tort and on contract, such recital is not open to objection on the ground of stating more than one cause of action, when such facts all relate to a single transaction and are relied upon as the basis of a single cause of action.—*Barto v. Nix*..... 563
16. *When Ordinance Need not Be Set Out—Judicial Notice.* It is not necessary to plead an ordinance by title, number and date of passage in a complaint filed in a court of the municipality, as it is the duty of such court to take judicial notice of the ordinance.—*Seattle v. Pearson*..... 575
17. *Inconsistent Defenses.* *Semble*, that a defendant cannot raise an objection to the sufficiency of an assessment roll in a suit for foreclosure of a tax lien, although he has entered a plea of general denial, when he has also in an affirmative defense set up facts inconsistent therewith.—*Olympia v. Stevens* 601
18. *Allegations of Fraud—Sufficiency of Complaint.* Technical objections to the form rather than to the substance of a pleading alleging fraud will be disregarded after judgment, when the case has been fully tried upon the issue.—*Tillow v. Cascade Oat Meal Co.*..... 652

See ABATEMENT OF ACTION; APPEAL, 11, 37; EQUITY, 1, 2; ESTOPPEL, 4; FRAUD, 1; INTERPLEADER; JUDGMENT, 1, 10; LOGS AND LOGGING, 1; MANDAMUS, 2; MUNICIPAL CORPORATIONS, 10; NEGOTIABLE INSTRUMENTS, 5; PARTIES; REFORMATION OF INSTRUMENTS, 1; REPLEVIN, 1.

PLEDGE.

Evidence of—Sufficiency. One claiming certain horses as pledgee thereof fails to establish such title in himself by proof that the horses had been delivered to a logging partnership of which he was a member, for its use, and that he had come into possession of the horses as manager of the partnership business, there being no proof that the property had ever been delivered to him as pledgee, although there was proof of an agreement to pledge same to him.—*Jose v Lynch* 654

PRINCIPAL AND AGENT. See CARRIERS, 2, 3.

PRINCIPAL AND SURETY.

1. *Negotiable Instruments—Extending Time of Payment—False Representation of Principal—Release of Surety.* In an action upon a promissory note upon which a surety sets up the defense that payment had been extended for a valuable consideration without his consent, evidence of a representation by the principal maker to the holder, that the extension was asked at the instance and request of the surety, is admissible, though not made in the presence of the surety, because, if the representation were in fact false, the agreement to extend which was secured by means of the false statement would be invalid and ineffectual.—*McDougall v. Walling* 78
2. *Same.* An agreement between a principal debtor and the holder of a note, to extend the time of payment for a definite period after maturity, in order to release the surety must be such an agreement as the principal debtor could himself enforce.—*Id.* 78
3. *Release of Surety by Extension.* A surety is not entitled to release by an agreement between the principal and payee to extend the time of payment of an obligation, when the agreement is too indefinite to be enforceable.—*Bank of British Columbia v. Jeffs* 230
4. *Acceptance of Interest in Advance.* Where a creditor, without inadvertence or mistake, receives a payment of interest in advance on the note of a debtor, and does not expressly reserve the right to sue before the expiration of the period for which interest is taken, there is a contract created to extend the time of payment during the period for which the interest is paid.—*Id.* 230
5. *Same.* The extension of the time of payment of a note for

PRINCIPAL AND SURETY—CONTINUED.

- a day only, in consideration of the payment of interest in advance, is sufficient to release a surety, when made without his knowledge or consent.—*Id.* 230
6. *Partial Release of Surety—Application of Deposit on Debt Due Bank.* The fact that the maker of a promissory note to a bank has on deposit therein a sum of money at the time his note is past due, and when action thereon is begun against a surety, does not impose a duty upon the bank to apply said sum in part payment of the note and thereby release the surety *pro tanto*.—*Id.* 230
7. *Suretyship — Parol Evidence of.* It may be shown by parol that one of two or more makers of a joint and several note was in fact a surety, and was known by the payee to be such when the note was taken.—*Id.* 230
8. *Discharge of Surety—Failure to Present Claim Against Decedent's Estate.* The failure to present a claim under a contract of guaranty to the representatives of the estate of the principal guarantor does not effect a discharge of a surety on the guaranty, inasmuch as such omission cannot be construed as a release of the principal by the affirmative act of the creditor.—*Donnerberg v. Oppenheimer.* 290
9. *Same — Death of Surety — Survival of Action.* Under Code Proc., §§704, 1042, providing for the survival of certain causes of action, the death of a surety before the principal will not operate as a discharge of the former's liability.—*Id.* 290
10. *Bond of Building Contractor—Release of Sureties.* The fact that, at the date a building contract bond was executed, the contractor had some men upon the premises engaged in work preparatory to the erection of the building, does not show a want of consideration for the bond, when there is no evidence showing that the contractor was in possession of the premises by direction or request of the owner, or that the giving of the bond was not an inducement to the signing of the contract on the part of the owner.—*De Mattos v. Jordan.* 378
11. *Same.* Sureties upon a building contractor's bond are not discharged by deviations from the specifications in the construction of the building, nor even by material alterations, when the contract itself permits such alterations.—*Id.* .. 378
12. *Same.* Where a building contractor was to be paid monthly as the work progressed, upon the supervising architect's

PRINCIPAL AND SURETY—CONTINUED.

- estimate of the amount of work completed, the fact that the owner accepts an order from the contractor in favor of a material man and agrees to pay same, on the day the estimate becomes due, paying at the time in cash, however, a small percentage of the claim to accommodate the material man, does not constitute such a payment in advance as will release the sureties upon the contractor's bond.—*Id* 378
13. *Same*. Sureties upon a building contractor's bond are not entitled to be discharged because their principal was forced to pay his debts, by the acts of the obligee, as an attorney, in securing the collection of claims due from the principal out of moneys payable to him on the building contract.—*Id*..... 378
14. *Same—Liability of Sureties—Extent of Recovery*. Although the owner who has been obliged to complete the construction of a building himself by reason of the abandonment of the contract by the contractor may be entitled to recover against the sureties upon the latter's bond, he can only recover for such of his expenses incurred for finishing the work as shall have been audited and certified by the architect, when the contract itself provides that the expenses incurred for materials and labor should be audited by the architect and that his certificate should be conclusive upon the parties.—*Id*..... 378
15. *Primary Liability of Surety—Novation*. Where a surety to avoid suit at maturity of note upon which he is liable, makes a new note to the payee with himself and wife as principals, under an agreement that such note should be the principal debt and that the original note should be held by the payee as collateral to the new note, he cannot insist that it is the duty of the payee to first collect the original note.—*McKee v. Whitworth* 536

See APPEAL, 15; HUSBAND AND WIFE, 5.

PROHIBITION, WRIT OF.

1. *When Lies—Restraining Contempt Proceedings*. Where one excluded from office by judgment of ouster refuses to yield possession on the ground that he has appealed from the judgment and filed a stay bond, and proceedings for contempt are instituted against him, he is not entitled to a writ of prohibition to restrain the court from further proceeding to punish him for contempt, inasmuch as he has

PROHIBITION, WRIT OF—CONTINUED.

a remedy by appeal from any judgment of conviction that may be rendered against him, and such proceeding for contempt is not for the purpose of enforcing the judgment of ouster, but is an independent proceeding to compel obedience to a lawful order of the superior court.—*Fawcett v. Superior Court*..... 342

2. *Taxation of Costs.* Upon the issuance of a writ of prohibition restraining action on the part of the superior court, the costs should be taxed against the party in the original action at whose instance the court was proceeding unlawfully.—*State, ex rel. Nolte, v. Superior Court*..... 500

3. *Jurisdiction of Supreme Court.* Under the constitution of this state the supreme court has jurisdiction to issue writs of prohibition to restrain the superior courts from proceeding without, or in excess of, jurisdiction, and the supreme court is not restricted in the exercise of such power merely to cases where it may be necessary in aid of its appellate jurisdiction.—*State, ex rel. Amsterdamsch Trustees Kantoor, v. Superior Court*..... 668

See CORPORATIONS, 14.

PUBLIC LANDS. See SCHOOL LANDS; TIDE LANDS.

QUO WARRANTO.

1. *When Lies—Removal From City Office.* Where a public officer of a city has been removed from office upon certain charges and findings made against him by the mayor, who has appointed a successor, the proper remedy for the officer removed is by an information in the nature of a *quo warranto*.—*State, ex rel. Niggle, v. Kirkwood*..... 298

2. *Same—Sufficiency of Charges.* The removal by the mayor of a city of a police commissioner is warranted, when it is charged and proved that as such officer he attempted to interfere with the administration of the police department in the enforcement of the law against prostitution, by seeking to influence the chief of police to permit the occupation of certain premises for immoral purposes, which the mayor had ordered abated as a nuisance, and had attempted to remove the chief of police upon failing to influence him, the commissioner being interested as owner in certain of the buildings so occupied for immoral purposes, from which the mayor had directed the objectionable occupants to be removed.—*Id*..... 298

QUO WARRANTO—CONTINUED.

3. *Same—Review of Proceedings.* Although charges preferred against a public officer by the mayor of a city may be somewhat indefinite, objection thereto on that ground cannot be raised in the superior court, when the person removed from office had gone to trial on them before the mayor without objection and without any motion to make more specific and certain.—*Id.*..... 298
4. *Judgment of Ouster—Scope of.* A judgment of ouster in a proceeding in the nature of *quo warranto* divests the person ousted of all official authority whatever, and fully and completely excludes him from the office as long as the judgment remains in force.—*Fawcett v. Superior Court*..... 642
5. *Same.* A judgment in favor of a relator in a proceeding by information to try the title to a public office is, from its very nature, self-executing, and, without the aid of process or further action of the court, it accomplishes the object sought to be attained, so that there is nothing upon which a stay bond can operate, except an execution for costs.—*Id.*..... 342
6. *Same.* A judgment of ouster is not so suspended by an appeal therefrom as to entitle appellant to the possession of the office during the pendency of the appeal.—*State, ex rel. Mullen, v. Superior Court*..... 376
7. *Same—Effect of Appeal.* After an appeal has been perfected from a judgment of ouster, the superior court has no jurisdiction in that proceeding, on any ground, to order plaintiff, who had been placed in possession of the office, to surrender possession to defendant.—*Id.*..... 376

See CORPORATIONS, 13, 14.

RAPE. See INDICTMENT AND INFORMATION, 2.

RECEIVERS.

1. *Leave of Court to Sue.* Leave of the court appointing a receiver to sue is not necessary before instituting suits in matters connected with his trust.—*Compton v. Schwabacher Bros. & Co.*..... 306
2. *Liabilities for Breach of Contracts Prior to Appointment.* The receivers of a railroad company are not liable for breach of a contract to carry a passenger entered into by the company prior to their appointment.—*Casey v. Northern Pacific R. R. Co.*..... 450

RECEIVERS—CONTINUED.

3. *Action by—Proof of Authority.* In an action by a receiver, failure to introduce in evidence the order appointing him will not entitle defendant to a non-suit, when the plaintiff testifies without objection that he is such receiver, and the action is instituted in the court which had appointed him receiver, and there is no showing of want of authority to bring suit.—*Tillow v. Cascade Oat Meal Co* 652

See BANKS AND BANKING, 3, 4, CORPORATIONS, 2-4, 6, 12-14.

REFORMATION OF INSTRUMENTS.

1. *Mutual Mistake—Pleading.* The fact that the complaint, in an action for the reformation of a mortgage, does not in express terms aver that the mortgage was erroneously executed through "mutual mistake" will not render it insufficient, if it sets up facts from which such a conclusion is inevitable. *Murdoch v. Leonard*..... 142
2. *Contract of Married Woman.* The deed or contract of a married woman may be reformed in this state, in cases of mutual mistake, since §1410, Gen. Stat., does away with the wife's legal disability to contract.—*Id*..... 142
3. *Evidence.* In an action to reform and foreclose a mortgage upon premises erroneously described, the mortgagors' ownership of the premises intended to be mortgaged is sufficiently proved *prima facie* by evidence showing that the defendants were in possession of the property, exercising acts of ownership, renting and receiving rent therefor, insuring same in their own right as owners, and that they offered to convey the property to the mortgagee in consideration of a release of the mortgage and the payment of a small sum of money.—*Id*..... 142
4. *Reconveyance Necessary.* In an action to reform and foreclose a mortgage upon premises misdescribed therein, the plaintiff is not entitled to a decree, when he has, in consideration of a release of the mortgage, received a deed conveying the premises as erroneously described in the mortgage, and has failed to surrender the deed or to tender a reconveyance of the premises, as misdescribed therein.—*Id*..... 142

REMOVAL OF CAUSES.

1. *Who Entitled to—Parties to Mortgage Foreclosure.* A non-resident defendant is not entitled to have an action for the

REMOVAL OF CAUSES—CONTINUED.

- foreclosure of a mortgage transferred to the federal court, when the complaint states but a single cause of action against all the defendants, and some of them, aside from the non-resident defendant, are necessary parties to a complete determination of the plaintiff's rights.—*Northwestern & Pacific Hypotheek Bank v. Saksdorf*. 475
2. *Time for Application*. An application by a defendant for a transfer of cause to the federal court must be made before the expiration of the time fixed by statute within which the defendant is called upon to answer, and such right cannot be enlarged by an extension of time in which to answer.—*Id.* 475

REPLEVIN.

1. *Sufficiency of Complaint—Title in Plaintiff*. Where it appears from the complaint in replevin that plaintiffs have a special property in a certain hay crop, and are entitled to its possession, the complaint is not subject to general demurrer, notwithstanding it may be alleged therein that they hold a mortgage on the crop, if, at the same time, it is made to appear that their right to possession is not dependent upon their title as mortgagees. (*Silsby v. Aldridge*, 1 Wash. 117, distinguished.)—*Brookman v. State Ins. Co.* 29
2. *Title to Maintain*. Where goods have been sold to a purchaser in consideration of an antecedent debt due him from the seller, although nothing in furtherance of the sale beyond the manifest intention of the parties to pass title has been done, replevin will lie at the instance of the purchaser against a third party, who holds the goods under a lease from the seller, which has been violated.—*Pacific Lounge, etc., Co. v. Rudebeck* 336
3. *Estoppel to Deny Plaintiff's Title*. Where a plaintiff has purchased the defendant's property at execution sale under a judgment which has afterwards been vacated, he is estopped to dispute the defendant's title thereto in a subsequent action instituted by the defendant against him for the recovery of the property.—*Benny v. Clein* 581

See DIVORCE, 1; HUSBAND AND WIFE, 1.

RESCUSSION. See CANCELLATION OF INSTRUMENTS.

SALE.

When Title Passes—Intention. In determining whether title has or has not passed by a contract of sale, the primary test is one of intention, and, if that is manifested clearly and unequivocally, it controls.—*Pacific Lounge, etc., Co. v. Rudebeck* 336

SCHOOL LANDS.

1. *Sale of School Lands—Improvements by Lessee.* The fact that improvements on school lands were placed thereon by plaintiff's assignor, in pursuance of an agreement between him and other persons as to their ownership, is not sufficient to defeat plaintiff's *prima facie* right to recover the value thereof in an action against the purchaser of such lands from the state, when such fact does not appear of record.—*J. F. Hart Lumber Co. v. Rucker*..... 456
2. *Same.* Where possession of school lands has been taken under a lease from the county commissioners, and improvements made thereon, a subsequent purchaser of such lands cannot escape liability for the value of such improvements by reason of any irregularity in the making of the lease.—*Id.*..... 456
3. *Same—Appraisal of Value of Improvements—Estoppel.* A purchaser of school lands is estopped to claim that no appraisal of the value of the improvements put thereon by a lessee has been made by the board of county commissioners sufficient for the purposes of a *prima facie* right of recovery, when a letter from himself to the board of state land commissioners, which was introduced in evidence, expressly call attention to the appraisal, while representing that it was too high.—*Id.*..... 456
4. *Improvements on School Lands—Recovery of Value.* The liability of defendant for improvements on school lands, as the purchaser thereof, sufficiently appears from evidence showing that while the particular lot in question was struck off to another, it was with the understanding that the defendant was to become the purchaser, and such understanding was carried out by the entry of defendant's name as purchaser, by the payment by him of the ten per cent. of the purchase price necessary to consummate the sale, and by the fact that, in a letter to the land commissioners seeking relief on account of the excessive appraisal of the improvements, no claim was made by him that he was not the purchaser at such sale.—*Id.*..... 456

SCHOOL LANDS—CONTINUED.

5. *Validity of Appraisalment.* The fact that the appraisalment of the value of improvements on school lands was made at the time of the sale thereof, and not at the time the lands were appraised, will not invalidate the appraisalment. (*Holm v. Prater*, 7 Wash. 207, distinguished.) *Id.*..... 456
6. *Same—Location of Improvements.* The purchaser of school lands who bids therefor with the expectation that he must pay the owner of improvements thereon for their appraised value, cannot defeat the recovery of such owner on the ground that a portion of the improvements are not on the land purchased but are on tide and in front thereof.—*Id.*.. 456

SCHOOLS AND SCHOOL DISTRICTS. See COUNTIES, 8.

SHERIFFS AND CONSTABLES.

- Mortgage Foreclosure Sale—Sheriff's Commission.* A sheriff is not entitled to a commission upon the sale of mortgaged premises under a decree of foreclosure, where the property was bid in by the plaintiff for the amount of the mortgage debt, although the officer and the purchaser may have intended that a portion of the sum bid should be in payment of a commission demanded by the officer.—*Soderberg v. King County* 194
- See MORTGAGES, 2.

STATES AND STATE OFFICERS. See EMINENT DOMAIN, 2.

STATUTES.

1. *Plurality of Subjects—Title of Act.* An act of the legislature will not be declared void on the ground of violating the constitutional provision that "no bill shall embrace more than one subject, and that shall be expressed in the title," unless the violation is most clear—sound policy and legislative convenience requiring that this provision should be liberally construed.—*Lancey v. King Co* 9
2. *Same.* The act of February 12, 1895, entitled "an act to grant and prescribe powers of counties relative to public works undertaken or proposed by the State of Washington, or the United States," contains but one subject matter, which is fairly embraced within the scope of its title.—*Id.*.. 9
3. *Legislative Construction.* When legislative construction of an act is made by a subsequent legislature and in apparent ignorance of what the law in force really is, such con-

STATUTES—CONTINUED.

- struction can have no force upon the courts, when called upon to construe the act.—*State, ex rel. Heaton, v. Beman* . . . 24
4. *Expression of Subject in Title.* The act of March 15, 1893, entitled "An act to provide for the economical management of county affairs," and providing that the salary allowed by law to an officer shall not exceed the amount of the legal fees collected on account of such office, does not effect a repeal of the act of February 7, 1891, fixing the salaries of justices of the peace in incorporated cities having more than five thousand inhabitants, since such subject is not em- in the title of the act of March 15, 1893, and would be un- constitutional so far as effecting that object is concerned.— *Anderson v. Whatcom County* 47
5. *Amendment—When Ineffectual.* The attempted amendment of § 1468, Code 1881, by reference to its section number, in the act of 1883, being ineffectual, such section continues in force as now incorporated in Code of Procedure as § 980.— *Poncin v. Furth* 201
6. *Repeal by Implication.* The act of March 2, 1891, entitled "an act providing for judges and additional judges for the superior court in various counties in the state of Washing- ton," etc., is repealed by implication by the act of March 19, 1895, entitled "an act in relation to superior courts and the election of superior court judges," as the plain intent of the legislature appears in the latter act to be to provide for the election of all the superior court judges of the state by the districts provided for in the act.—*State, ex rel. Dustin, v. Rust* 403
7. *Titles of Acts.* The subject matter of an act providing for the election of superior court judges by newly established districts is sufficiently embraced in the title reciting that it is "an act in relation to superior courts and the election of superior court judges."—*Id.* 403
8. *Constitutionality—Scope of Title.* The title of an act showing that its object is to provide for the organization and gov- ernment of irrigation districts and the sale of bonds arising therefrom is not broad enough to embrace a provision in the act for validating the indebtedness of a district previ- ously organized and the levying of a tax to pay the same.— *Percival v. Cowychee & Wide Hollow Irrigation District.* 480

See APPEAL, 2.

STIPULATIONS.

When Proof of Signatures Unnecessary. One who joins in signing a stipulation with the other parties in the action in effect authenticates the signatures of the others and is not in a position to dispute them and insist on the court's requiring proof of any of the signatures.—*Jones v. Wolverton*. 590

See EXECUTORS AND ADMINISTRATORS, 6.

SUBROGATION.

Assumption of Mortgage—Right to Subrogation. A person who has assumed and agreed to pay a mortgage cannot, upon making the payment, be subrogated to the rights of the mortgagee.—*Isensee v. Austin*. 352

See JUDGMENTS, 5.

SUNDAY LAWS. See CONSTITUTIONAL LAW, 4.

SURVIVAL OF ACTIONS.

1. *Decease of Joint Debtor—Survival of Liability.* Upon the death of a joint debtor, the right of action on the liability survives against his representatives.—*Megrath v. Gilmore*. . . 558
2. *Same—Death Pending Appeal—Substitution of Executors—Failure to Present Claim.* Where pending an appeal from a judgment, the appellant dies and his executors are substituted by stipulation, they cannot on a retrial of the cause after reversal, demand a non-suit on the ground that the claim in action had never been presented to them as executors.—*Id* 558

See PRINCIPAL AND SURETY, 9.

TAXATION.

1. *Foreclosure of Lien—Validity of Assessment Roll.* An assessment roll, which is sufficient to authorize the proper officer of the city to collect the taxes is, *prima facie* sufficient to authorize the court to decree foreclosure for non-payment of such taxes.—*Olympia v. Stevens*. 601
2. *Same—Illegal Valuation—Evidence.* A finding that a board of equalization had raised the valuation of city property to a higher sum than they consider it worth, is not warranted by evidence tending to show that the valuation placed on the property by the assessor was nearer its cash value, and that several members of the board had made statements to

TAXATION—CONTINUED.

the effect that it was necessary to place a high valuation upon the property of the city to enable it to meet necessary obligations, when the positive evidence of the members of the board is that they had no intention of raising the value of property beyond what was believed to be its cash value.

—*Id.*..... 601

3. *Same—Fraud.* No question of fact as to the valuation placed on property can be raised in an action to foreclose a tax lien thereon, unless it is first shown that the action of the board of equalization in valuing it was illegal or fraudulent.—*Id.*..... 601

See APPEAL, 30; CONSTITUTIONAL LAW, 5; MUNICIPAL CORPORATIONS, 2, 11-13; PAYMENT, 3.

TENANCY IN COMMON.

Recovery of Expenditures Made by Co-Tenant. A claim of one co-tenant against the others on account of expenditures made by him upon the common property of all cannot be collected otherwise than by the retention of the property until it is paid.—*Huston v. Becker*..... 586

TIDE LANDS. See EMINENT DOMAIN, 2.

TRESPASS.

Evidence—Market Value of Property Destroyed. In an action of trespass by a lessee to recover damages for the tearing down of a leased building and the removal of the lessee's effects therefrom, evidence of the market value of the building and contents is admissible.—*Froelich v. Morse*..... 636

TRIAL.

1. *When Findings Unnecessary.* Neither findings of fact nor conclusions of law are required on the part of a trial court when it grants a motion for a non suit in a jury case.—*Barkley v. Barton*..... 33
2. *Evidence Responsive to Issues.* Where no attack has been made upon an answer to a complaint in the lower court, the defendant is entitled to have the jury charged upon any phase of the case as made by the evidence, which is responsive to the issues.—*Secor v. Oregon Imp. Co.*..... 35
3. *Instructions—Harmless Error.* Errors growing out of a charge are always to be disregarded when the verdict is so

TRIAL—CONTINUED.

- plainly in accordance with the evidence that it follows as a conclusion of law thereon.—*Id* 35
4. *Admission of Incompetent Evidence — Harmless Error.* In the foreclosure of a mortgage to a corporation, the admission of other than record proof as to the change of name of the corporation from that stated in the mortgage to the one under which the action was prosecuted is not prejudicial error, when the record also shows a finding, without an exception to it, that "the plaintiff company was and now is the owner and holder of said mortgage."— *United States Savings and Loan Co. v. Cade*..... 38
5. *Instructions—Waiver of Objections.* Error in giving an instruction will not be considered on appeal, when it appears that a number of special exceptions to the instructions were taken, stating the reasons and grounds thereof with particularity, but that the error urged in the appellate court had not been made a ground of exception in the court below.—*Edmunds v. Black* 73
6. *Trial by Court— Sufficiency of Findings.* The fact that findings of fact made by the court are obscure, indefinite and uncertain, and do not set out the specific facts established by the proofs, cannot be urged as error, when the decree based thereon is one dismissing the action for the reason that plaintiffs had failed to make out a case.— *Thorne v. Joy* 83
7. *Admission of Further Evidence After Case Closed.* It is within the discretion of the trial court to reopen the case for the introduction of additional testimony.—*Id*..... 83
8. *Failure to Transmit Instructions to Jury Room on Demand.* The fact that one instruction given by the court had been inadvertently withheld by the clerk, upon a request from the jury during their deliberations to have the instructions sent them, cannot be urged as error, in the absence of any showing that the appellant was prejudiced by such omission.—*North River Boom Co. v. Smith*..... 138
9. *Inconsistency Between General Verdict and Special Findings.* Where the special findings of the jury are inconsistent with the general verdict, the former controls the latter.—*Pepperall v. City Park Transit Co.*..... 176
10. *Instructions — Construction as a Whole.* The fact that the court in charging the jury as to the right of plaintiff to recover in case of the defendant's negligence, left out of con-

TRIAL—CONTINUED.

- sideration the question of contributory negligence of the plaintiff, is not error, when the court expressly charges the jury upon that point later in the course of its instructions.—*Carroll v. Burleigh* 208
11. *Sufficiency of Exceptions to Instructions.* Under Laws 1893, p. 112, § 4, providing that "Exceptions to a charge to a jury . . . may be taken by any party by stating to the court . . . that such party excepts to the same, specifying . . . the parts of the charge excepted to," a general exception to a charge of the court setting forth four distinct elements of damage upon which plaintiff might recover, if he made out his case, is insufficient for the purpose of securing a review on appeal, when three of the elements of damage discussed by the court are manifestly correct, and the attention of the court was not directed to the particular portion of the charge complained of.—*McDonough v. Great Northern Ry. Co.* 244
12. *Misconduct of Jury—Ascertainment of Verdict by Lot.* When a jury has determined upon a verdict in favor of a plaintiff in an action for the recovery of damages, there is no impropriety in the jury's resorting to lot to find the average sense of the jury upon the amount of the verdict to be returned, when there is no agreement to be bound thereby and the minds of the jurors are free to deliberate and act upon the result, using the same as a basis of discussion in arriving at the amount of the recovery they should award.—*Watson v. Reed.* 440
13. *Conduct of Trial.* The fact that the court asked counsel for defendant, in the presence of the jury, whether they had any objection to the separation of the jury before verdict, is not ground of reversal, in the absence of any proof that defendant was prejudiced thereby.—*State v. Holedger* . . . 443
14. *Withdrawal of Case from Jury.* Where there is no conflict in the proofs, the court is authorized in taking the case from the jury and rendering judgment for the amount claimed.—*Underwood v. Stack.* 497
15. *Request for Written Instructions—Failure of Court to Comply.* The giving of a partly written and partly oral charge to the jury is error, where written instructions have been requested; and the fact that a stenographer present in court took down the charge as given by the judge is not a sufficient compliance with the requirements of the statute in that respect.—*State v. Miles.* . . . 534

TRIAL—CONTINUED.

16. *Misconduct of Judge—Entering Jury Room.* The action of the trial court in leaving the bench and entering the jury room, at the request of that body while in consultation, is such misconduct as to warrant a reversal.—*State v. Wroth*... 621
17. *Non-Suit—Effect of Evidence Improperly Admitted.* A non-suit is improper, when there is sufficient testimony to sustain a verdict, although the facts testified to may be inadmissible in evidence and are only properly in the case as a result of the unchallenged examination of witnesses.—*Dutcher v. Howard*... 693
- See APPEAL, 5.

TRUSTS.

1. *Creation and Extinguishment—Voluntary Associations.* Where a voluntary association has been formed, known as the Fishermen's Union, for the purpose of maintaining the price of fish, which were to be sold through a committee, moneys advanced for the fish by a purchaser do not become the joint property of the members of the union to be held in trust for distribution among them.—*Fournie v. Shepard*. 94
2. *Same.* Where money of an association, held in trust by one member thereof, has been paid out to another party, its trust character is, in the absence of fraud, thereby lost, and cannot be enforced as against such third party.—*Id.*... 94
3. *Powers of Trustee Holding Legal Title.* The authority of a trustee to deal with real property, the legal title of which has been vested in him by the *cestui que trust*, cannot be questioned by third parties dealing with him, so long as such authority is not denied by the *cestui que trust*.—*Moody v. Noyes*... 128
- See APPEAL, 1; EQUITY, 1; EXECUTORS AND ADMINISTRATORS, 3, 4.

VENDOR AND PURCHASER. See ACCOUNTING; DAMAGES, 5; FRAUDS, STATUTE OF.

VENUE IN CIVIL CASES.

Application for Change—Waiver. A party entitled to a change of venue under Code Proc., § 162, because sued in a county other than that of his residence, does not, after having made proper demand for change, waive his right thereto by failing to appear at the time a ruling is had upon his application.—*State, ex rel. Stockman, v. Superior Court*... 368

WHARVES.

1. *Private Ownership—Right of Public to Use.* A wharf belonging to an individual may from its use become in its nature a public wharf.—*Barrington v. Commercial Dock Co.*..... 170
2. *Same.* While Gen. Stat., § 2136, recognizes the right of a private ownership in wharves, the section, as a whole cannot be construed to mean that such private property may not be devoted to such use as will, in contemplation of law, make it partake of the nature of a public wharf.—*Id.*..... 170
3. *Same.* Every vessel has a license to use, for her safety or convenience, any public wharf, on navigable waters, or any private wharf, which by the nature of its use, becomes affected with a public interest upon the payment of reasonable wharfage charges.—*Id.*..... 170

WILLS.

1. *Construction—Rights of Legatee's Administrator.* A will bequeathing to each of the testator's two children one-half of all the moneys that may be realized from the sale of all his real and personal property, to be paid to them on their attaining the age of twenty-one years respectively, is a devise to the children and not to the executor, though the will may further provide that all the property is devised to an executor, in trust, with power to sell same and invest the proceeds in securities, until the children attain their majority, when principal and interest is to be paid over to them.—*Rogers v. Strobach* 472
2. *Same.* Upon the death of one of the devisees under such will before having attained his majority, the administrator of his estate is entitled to demand and receive his portion from the executor.—*Id.*..... 472

See EXECUTORS AND ADMINISTRATORS, 3, 4.

WITNESSES.

1. *Transactions with Decedent—Interest of Witness.* The rule excluding the testimony of an interested party in an action against the executor of a deceased person, will apply to one who has conveyed away his interest in the land which is the subject matter of the action by a deed absolute on its face but in reality only a mortgage, even though, for the purpose of rendering his testimony competent, he execute a release of his right to redeem.—*Thorne v. Joy.*..... 83

WITNESSES—CONTINUED.

2. *Same.* Agreements and arrangements entered into with a deceased person cannot be given in evidence in an action against his executor by parties whose interests are adverse, even if competent as to another defendant in the action, when the relief sought against such other defendant is incidental to the principal object sought by the action against such executor, and when the court has not been sufficiently advised as to the restrictive purpose for which the evidence was offered.—*Id.*..... 83
3. *Impeachment by Stenographer's Notes.* A transcript of the stenographer's notes showing the testimony of a witness on a former trial, is not competent evidence for impeaching the witness's testimony in a subsequent trial of the same cause.—*Redford v. Spokane Street Railway Co.*..... 419
4. *Impeachment.* A witness cannot be impeached as to his truth and veracity by the testimony of other witnesses that, from their knowledge of his reputation, they would not believe him under oath.—*State v. Miles.*..... 534
5. *Scope of Examination—Reasons for Positive Testimony as to Facts.* Where a witness has testified positively to a fact it is not competent for the party introducing him to elicit from the witness a statement as to the reasons which led him to come to the conclusions to which he has testified.—*Sprenger v. Tacoma Traction Co.*..... 660
6. *Re-examination—May Cover Ground of Cross-examination.* Where counsel examine a witness as to facts not admissible in evidence the other party is entitled to re-examine as to the testimony elicited.—*Dutcher v. Howard.*..... 693

See EVIDENCE, 3, 4; HOMICIDE, 4.

See also

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